No. 15-105
Vide 14-1418, 14-1453, 14-1505, 15-119,15-191,15-35

Title: Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al., Petitioners
v.
Sylvia Burwell, Secretary of Health and Human Services,et al.

Docketed: July 23, 2015
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (13-1540)
Decision Date: July 14, 2015

Questions Presented

---Date---	--------Proceedings and Orders----------
Jul 23 2015	Petition for a writ of certiorari filed. (Response due August 24,2015)
Jul 28 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 13 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 18 2015	Order extending time to file response to petition to and including September 23, 2015.
Aug 21 2015	Brief amici curiae of Orthodox Jewish Rabbis filed.
Aug 24 2015	Brief amicus curiae of Independent Women's Forum filed.
Aug 24 2015	Brief amici curiae of Dominican Sisters of Mary,Mother of the Eucharist, et al. filed.
Aug 24 2015	Brief amici curiae of Christian and Missionary Alliance Foundation, Inc., et al.filed.
Aug 24 2015	Brief amici curiae of Southern Baptist Theological Seminary, et al.filed.
Aug 24 2015	Brief amici curiae of The Catholic Benefits Association, et al. filed.
Aug 24 2015	Brief amici curiae of Texas, et al. filed.
Aug 24 2015	Brief amicus curiae of Council for Christian Colleges & Universities filed.
Aug 24 2015	Brief amicus curiae of Cato Institute filed.
Aug 24 2015	Brief amicus curiae of American Center for Law and Justice filed.
Aug 24 2015	Brief amici curiae of Association of American Physicians & Surgeons, et al. filed.
Aug 24 2015	Brief amici curiae of Christian Legal Society, et al.filed.
Aug 24 2015	Brief amici curiae of Carmelite Sisters of the Most Sacred Heart of Los Angeles, et al.filed.
Aug 24 2015	Brief amicus curiae of Foundation for Moral Law. filed.
Aug 24 2015	Brief amici curiae of Law Professors Bruce P. Frohnen, et al. filed.
Sep 21 2015	Order further extending time to file response to petition to and including September 30, 2015.
Sep 30 2015	Brief of respondents Sylvia Burwell, Secretary of Health and Human Services, et al. filed. VIDED.
Oct 13 2015	Reply of petitioners Little Sisters of the Poor Home for the Aged, Denver, Colorado, et al. filed.

Oct 14 2015	DISTRIBUTED for Conference of October 30, 2015.
Nov 2 2015	DISTRIBUTED for Conference of November 6, 2015.
Nov 6 2015	Petition GRANTED limited to Questions 1 and 2 presented by the petition. The petition for a writ of certiorari in No. 14-1418 is granted limited to Question 1 presented by the petition. The motion of Association of American Physicians & Surgeons, et al. for leave to file a brief as amici curiae and the petition for a writ of certiorari in No. 14-1453 are granted. The petitions for writs of certiorari in Nos. 14-1505, 15-35, 15-119 and 15-191 are granted. The cases are consolidated.
Nov 6 2015	Letter from The Clerk to counsel for the parties requesting a joint briefing proposal by 1 p.m., Monday, November 16, 2015. VIDED
Nov 17 2015	The briefing proposal set forth in the parties' letter of November 16, 2015, is adopted. Petitioners in Nos. 14-1418, 14-1453, and 14-1505 will file one consolidated opening brief and one reply brief. Petitioners in Nos. 15-35, 15-105, 15-119, and 15-191 will file one consolidated opening brief and one reply brief. Petitioner's opening briefs, not to exceed 20,000 words each, are to be filed on or before January 4, 2016. Respondents will file one consolidated brief, not to exceed 22,500 words, on or before February 10, 2016. Petitioner's reply briefs, not to exceed 8,000 words each, are to be filed on or before March 11, 2016. VIDED
Dec 7 2015	Joint motion for divided argument and enlargement of time for oral argument filed by petitioners. VIDED.
Dec 14 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondents. VIDED
Dec 15 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received, on behalf of all petitioners, in these consolidated cases. VIDED
Jan 4 2016	Joint appendix filed. (3 Volumes) (statement of costs filed) VIDED.
Jan 4 2016	Brief of Petitioners in Nos. 14-1418, 14-1453 & 14-1505 filed. VIDED.
Jan 4 2016	Brief of Petitioners in Nos. 15-35, 15-105, 15-119, & 15-191 filed. VIDED.
Jan 5 2016	Brief amici curiae of Orthodox Jewish Rabbis filed. VIDED.
Jan 8 2016	Brief amicus curiae of catholic Defense League filed.
Jan 8 2016	Brief amici curiae of United States Conference of Catholic Bishops, et al. filed. VIDED.
Jan 8 2016	Brief amici curiae of CNS International Ministries, Inc. and Heartland Christian College filed. VIDED.
Jan 8 2016	Brief amicus curiae of the Breast Cancer Prevention Institute filed. VIDED.
Jan 10 2016	Brief amici curiae of Residents and Families of Residents at Homes of the Little Sisters of the Poor filed. VIDED.
Jan 11 2016	Brief amicus curiae of The School of the Ozarks, Inc. d/b/a College of the Ozarks filed. VIDED.
Jan 11 2016	Brief amici curiae of Texas, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Southern Baptist Theological Seminary, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Christian Legal Society, at al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Church of the Lukumi Babalu Aye, Inc., et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Christian and Missionary Alliance Foundation, Inc., et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of 207 Members of Congress filed. VIDED.
Jan 11 2016	Brief amici curiae of National Jewish Commission on Law and Public Affairs (COLPA) filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed. VIDED.
Jan 11 2016	Brief amici curiae of Former Justice Department Officials filed. VIDED.
Jan 11 2016	Brief amicus curiae of Ethics and Public Policy Center filed. VIDED.
Jan 11 2016	Brief amici curiae of The Cato Institute and Independent Women's Forum filed. VIDED.

Jan 11 2016	Brief amici curiae of National Association of Evangelicals, at al. filed. VIDED.
Jan 11 2016	Brief amici curiae of 50 Catholic Theologians and Ethicists filed. VIDED.
Jan 11 2016	Brief amici curiae of Association of American Physicians & Surgeons, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Constitutional Law Scholars filed. VIDED.
Jan 11 2016	Brief amicus curiae of Women Speak for Themselves filed. VIDED.
Jan 11 2016	Brief amicus curiae of Liberty Counsel filed. VIDED.
Jan 11 2016	Brief amicus curiae of Council for Christian Colleges and Universities filed. VIDED.
Jan 11 2016	Brief amicus curiae of Foundation for Moral Law filed.
Jan 11 2016	Brief amicus curiae of the Knights of Columbus filed. VIDED.
Jan 11 2016	Brief amici curiae of Bart Stupak, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Dominican Sisters of Mary, Mother of the Eucharist, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Thomas More Law Center filed. VIDED.
Jan 11 2016	Brief amici curiae of ACNA Jurisdiction of the Armed Forces and Chaplaincy, et al. filed. VIDED.
Jan 11 2016	Brief amicus curiae of Eternal Word Television Network filed. VIDED.
Jan 11 2016	Brief amicus curiae of David Boyle filed. VIDED.
Jan 11 2016	Brief amicus curiae of Justice and Freedom Fund filed. VIDED.
Jan 11 2016	Brief amici curiae of Thirteen Law Professors filed. VIDED.
Jan 11 2016	Brief amicus curiae of International Conference of Evangelical Chaplain Endorsers filed. VIDED.
Jan 11 2016	Brief amicus curiae of Concerned Women for America filed. VIDED.
Jan 11 2016	Brief amicus curiae of Michael J. New, Ph.D., Associate Scholar at the Charlotte Lozier Institute filed. VIDED.
Jan 11 2016	Brief amicus curiae of American Center for Law and Justice filed. VIDED.
Jan 11 2016	Brief amici curiae of U.S. Justice Foundation, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Carmelite Sisters of the Most Sacred Heart of Los Angeles, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of The Catholic Benefits Association, et al. filed. VIDED.
Jan 11 2016	Brief amici curiae of Religious Institutions filed. VIDED.
Jan 15 2016	Joint motion for divided argument and enlargement of time for oral argument GRANTED. VIDED
Jan 29 2016	SET FOR ARGUMENT ON Wednesday, March 23, 2016. VIDED
Feb 8 2016	Record requested from U.S.C.A. 10th Circuit.
Feb 10 2016	CIRCULATED.
Feb 10 2016	Brief of respondents Sylvia Burwell, Secretary of Health and Human Services, et al. filed. VIDED. (Distributed)
Feb 10 2016	Brief amicus curiae of American Humanist Association filed. VIDED. (Distributed)
Feb 12 2016	Brief amici curiae of Harvard Law School Center for Health Law and Policy Innovation, et al. filed. VIDED. (Distributed)
Feb 16 2016	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 16 2016	Brief of Church-state Scholars filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Ovarian Cancer Research Fund Alliance, et al. (2 Volumes) filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Baptist Joint Committee for Religious Liberty filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Compassion & Choices filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Women's Law Center and 68 Other Organizations filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Norman Dorsen, et al. filed. VIDED. (Distributed)

Feb 17 2016	Brief amici curiae of American Jewish Committee, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of American College of Obstetricians and Gynecologists, et al.filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of National Latina Institute for Reproductive Health, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Catholics for Choice, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Former State Attorneys General, et al.filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Foreign and International Law Experts Lawrence O. Goslin, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of 240 Students, Faculty, and Staff at Religiously Affiliated Universities filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of American Academy of Pediatrics filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Scholars of Religious Liberty Sarah Barringer Gordon, et al.filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Health Policy Experts filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Anti-Defamation League, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Black Women's Health Imperative filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Guttmacher Institute, and Professor Sara Rosenbaum filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of 123 Members of the United States Congress filed.VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al.filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of Military Historians filed.VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The National Health Law Program, et al.filed.VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of California, et al. filed. VIDED. (Distributed)
Feb 17 2016	Brief amicus curiae of Honorable Robert C. "Bobby" Scott filed. VIDED. (Distributed)
Feb 17 2016	Brief amici curiae of The Center for Inquiry, and American Atheists filed. VIDED. (Distributed)
Mar 4 2016	Letter from Counsel for the respondents with copy of C.A. 11th Circuit opinion attached VIDED. (Distributed)
Mar 11 2016	Reply of Petitioners in Nos.15-35, 15-105, 15-119, & 15-191 filed.VIDED. (Distributed)
Mar 11 2016	Reply of Petitioners in Nos.14-1418, 14-1453 & 14-1505 filed. VIDED. (Distributed)
Mar 23 2016	Argued. For petitioners in Nos.15-35, 15-105, 15-119 & 15-191: Paul D.Clement, Washington, D.C. For petitioners in Nos.14-1418, 14-1453, & 14-1505: Noel Francisco, Washington, D.C. For respondents: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D.C. VIDED.
Mar 29 2016	The parties are directed to file supplemental briefs that address whether and how contraceptive coverage may be obtained by petitioner's employees through petitioner's insurance companies, but in a way that does not require any involvement of petitioners beyond their own decision to provide health insurance without contraceptive coverage to their employees. Petitioners with insured plans are currently required to submit a form either to their insurer or to the Federal Government (naming petitioner's insurance company), stating that petitioners object on religious grounds to providing contraceptive coverage. The parties are directed to address whether contraceptive coverage could be provided to petitioner's employees, through petitioner's insurance companies, without any such notice from petitioners. For example, the parties should consider a situation in which petitioners would contract to provide health insurance for

	their employees, and in the course of obtaining such insurance, inform their insurance company that they do not want their health plan to include contraceptive coverage of the type to which they object on religious grounds.
Mar 29 2016	Petitioners would have no legal obligation to provide such contraceptive coverage, would not pay for such coverage, and would not be required to submit any separate notice to their insurer, to the Federal Government, or to their employees. At the same time, petitioner's insurance company aware that petitioners are not providing certain contraceptive coverage on religious grounds. would separately notify petitioner's employees that the insurance company will provide cost-free contraceptive coverage, and that such coverage is not paid for by petitioners and is not provided through petitioner's health plan. The parties may address other proposals along similar lines, avoiding repetition of discussion in prior briefing. The briefs, limited to a single brief 25 pages in length for petitioners, and a single brief 20 pages in length for respondents, are to be filed simultaneously with the Clerk and served upon counsel for the other parties on or before April12, 2016. Reply briefs, limited to a single brief 10 pages in length for petitioners and for respondents, are to be filed simultaneously with the Clerk and served upon opposing counsel for the other parties on or before April20, 2016. VIDED
Apr 12 2016	Supplemental brief of petitioners filed. VIDED. (Distributed)
Apr 12 2016	Supplemental brief of respondents filed. VIDED. (Distributed}
Apr 20 2016	Supplemental reply brief of petitioners filed. VIDED. (Distributed)
Apr 20 2016	Supplemental reply brief of respondents filed. VIDED. (Distributed)
May 16 2016	Judgment VACATED and case REMANDED. Opinion per curiam. Sotomayor, J., filed a concurring opinion, in which Ginsburg, J., joined. VIDED.
Jun 17 2016	JUDGMENT ISSUED

No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The text of the Affordable Care Act (ACA) says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. The Department of Health and Human Services (HHS) has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA-approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either directly or via a regulatory mechanism through which they must execute documents that authorize and obligate third parties to use their healthcare plans to facilitate the provision of contraceptive coverage to their employees and that, in the government's view, put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already considered the direct method of compliance and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). It is undisputed, however, that nonexempt religious employers such as petitioners hold equally sincere religious objections to the regulatory method of compliance as well. It is further undisputed that they face draconian fines if they refuse to comply via one of those two avenues.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

3. Does the First Amendment allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

Petitioners, who were Plaintiffs below, are the Little Sisters of the Poor Home for the Aged, Denver, Colorado, a Colorado nonprofit corporation; Little Sisters of the Poor, Baltimore, Inc., a Maryland nonprofit nonstock corporation, by themselves and on behalf of all others similarly situated; Christian Brothers Services, a New Mexico nonprofit corporation; Christian Brothers Employee Benefit Trust; Reaching Souls International, Inc., an Oklahoma not-for-profit corporation; Truett-McConnell College, Inc., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; and GuideStone Financial Resources of the Southern Baptist Convention, a Texas nonprofit corporation. GuideStone's sole member is the Southern Baptist Convention, a Georgia religious-nonprofit corporation. No other petitioner has a parent corporation. No publicly held corporation owns any portion of any of the petitioners.

Respondents, who were Defendants below, are Sylvia Burwell in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary

of the United States Department of the Treasury; and the United States Department of the Treasury.

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APPENDIX B: Interim Order, *Little Sisters of the Poor Home for the Aged, Denver, Colo., et al. v. Kathleen Sebelius,et al.*, No. 13A691 (U.S. Jan. 24, 2014) 150a

APPENDIX C: Order Denying in Part Defendants' Motion to Dismiss and Denying Plaintiffs' Motion for Preliminary Injunction, *Little Sisters of the Poor Home for the Aged, Denver, Colo., et al. v. Kathleen Sebelius, et al.*, No. 13-cv-2611 (D. Colo. Dec. 27, 2013) 152a

APPENDIX D: Memorandum Decision and Order, *Reaching Souls Int'l, Inc., et al. v. Kathleen Sebelius, et al.*, No. 13-cv-1092 (W.D. Okla. Dec. 20, 2013) 190a

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PETITION FOR A WRIT OF CERTIORARI

The Little Sisters of the Poor are Catholic nuns who devote their lives to caring for the elderly poor. The government has put them to the impossible choice of either violating the law or violating the faith upon which their lives and ministry are based. HHS insists that the Little Sisters must comply with a mandate that their employee healthcare plans "provide coverage" for free contraceptives. Although there is no dispute that the Little Sisters sincerely believe that all the available compliance methods would make them morally complicit in grave sin, HHS refuses to give them the exemption it has given other religious employers, and instead requires them to comply, either directly or by executing documents that authorize and obligate others to use the Little Sisters' healthcare plans to accomplish the "seamless" provision of contraceptive coverage.

HHS does not dispute that the Little Sisters sincerely believe that their religion no more allows them to comply with the mandate via this regulatory mechanism than to do so directly. But HHS disagrees with the Little Sisters' moral analysis. In its view, the Little Sisters are "fighting an invisible dragon" that can be vanquished with the "stroke of their own pen." If the Little Sisters follow their own moral compass instead of HHS's, they face millions of dollars in penalties.

This Court addressed a nearly identical dynamic in upholding the religious exercise claim of three family-owned for-profit companies in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Court made clear beyond cavil—as it had in a long

line of cases preceding *Hobby Lobby*—that courts may not second-guess sincerely-held religious beliefs by suggesting that the degree of complicity required is insufficient to violate religious scruples. Thus, especially after *Hobby Lobby*, there should be no doubt that the religious exercise of the Little Sisters and their co-petitioners has been substantially burdened. The mandate and the penalties for noncompliance here are identical, and petitioners sincerely believe that the only avenues for complying with the mandate violate their religion. That should be the end of the substantial burden inquiry.

Remarkably, the Tenth Circuit nonetheless concluded that there is no substantial burden on religious exercise because, in its view, the regulatory avenue does not really make petitioners morally complicit. That approach plainly conflicts with *Hobby Lobby* and decades of cases before it forbidding courts from engaging in any such inquiry. It also plainly conflicts with RFRA itself, which protects "any religious exercise," not just those exercises that a court finds reasonable or consistent with its own views of an adherent's religion. Without this Court's intervention, the Little Sisters will be forced to choose between violating their religion or violating the ACA, as a consequence of a decision that is flatly irreconcilable with this Court's precedents.

That would be reason enough for plenary review, but a number of additional considerations strongly support this Court's review at this juncture and in this case. This Court has already used its extraordinary authority under the All Writs Act in three cases involving challenges to the mandate by nonprofit re-

ligious employers, including this one. The felt need for that extraordinary intervention both underscores the extraordinary importance of this issue and makes clear that deferring review will produce not orderly percolation, but the need for further extraordinary intervention by this Court.

Furthermore, this case vividly illustrates just how extreme HHS's position really is, as HHS has demanded that the Little Sisters comply with the mandate via the regulatory option to which they object even though HHS itself insists that doing so will not fulfill its regulatory objective of providing free contraceptives to the Little Sisters' employees. That makes the need for review particularly important here. Whatever the strength of the government's interest in overriding sincere religious objections when doing so will allow it to accomplish its regulatory objectives, it cannot possibly have a compelling interest in overriding sincere religious objections when the government claims doing so will not even produce that result. Accordingly, for the Little Sisters and the over-400 employers in their class action, HHS's least restrictive means case is distinctly weak. Thus, the Little Sisters should prevail no matter how the Court ultimately resolves that analysis for other religious objectors as to which HHS's insistence on regulatory compliance is more likely to fulfill its regulatory objective. Because this petition includes both the Little Sisters (and its class) as well as employers like Reaching Souls, it allows the Court to consider both least restrictive means contexts together. But even if the Court grants another petition, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious objections even when it

says it cannot accomplish its regulatory goals does not escape this Court's review.

After the decision below, the right of the Little Sisters to practice their religion as they understand it hangs in the balance. And their religious objections are hardly idiosyncratic. Indeed, objections to HHS's regulatory compliance method are so pervasive and profound that it is inevitable that this Court will need to resolve the exceptionally important questions presented. The Court should do so in time to ensure that religious exercise rights of the Little Sisters and their fellow petitioners are not sacrificed to a fundamentally misguided decision about what constitutes a substantial burden and the proper role for an Article III court in evaluating sincere religious beliefs.

OPINIONS BELOW

The district court's opinion in *Little Sisters* is reported at 6 F.Supp.3d 1225. App.152a. The district court's opinion in *Reaching Souls*, 2013 WL 6804259, is unreported. App.190a. The Tenth Circuit's opinion is reported at --- F.3d ---, 2015 WL 4232096. App.2a.

JURISDICTION

The Tenth Circuit's judgment was entered on July 14, 2015. App.2a. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The provisions are set forth in Appendix E (App.211a).

STATEMENT

The Contraceptive Mandate

The ACA mandates that any "group health plan" must "provide coverage" for "preventive care" for women without "any cost sharing." 42 U.S.C. 300gg-13(a). Congress itself did not define "preventive care" but instead allowed HHS to do so. *Ibid.* HHS outsourced that "important and sensitive decision" to the Institute of Medicine, a private organization. *Hobby Lobby*, 134 S.Ct. at 2762. The Institute's definition, which HHS adopted, includes all FDA-approved contraceptive methods and sterilization procedures, including four methods that can prevent the implantation of a fertilized egg. *Id.* at 2762-63. Failure to "provide coverage" for all FDA-approved methods and procedures triggers severe penalties. See, *e.g.*, 26 U.S.C. 4980D ($100 per day per affected individual); 26 U.S.C. 4980H ($2000 per year per full-time employee).

The mandate to cover all FDA-approved contraceptives is not universal; instead, it is subject to both statutory and regulatory exemptions. First, as a statutory matter, employers with "grandfathered" healthcare plans—plans that existed before March 30, 2010, and have not made certain changes after that date—need not comply with the "provide coverage" mandate at all. See 42 U.S.C. 18011; *Hobby Lobby*, 134 S.Ct. at 2764. Although these plans cover tens of millions of individuals and must comply with a subset of ACA reforms that Congress prioritized and "HHS has described as 'particularly significant protections,'" the statutory mandate to cover preventative care, which has been administratively inter-

preted to mandate contraceptive coverage, "is expressly excluded from this subset." *Id.* at 2780 (quoting 75 Fed. Reg. 34,538, 34,540 (June 17, 2010)); see also 42 U.S.C. 18011(a)(4). That exclusion exists "simply [to serve] the interest of employers in avoiding the inconvenience of amending an existing plan." *Hobby Lobby*, 134 S.Ct. at 2764. Although HHS has suggested that it intends to phase grandfathered plans out over time, it has not actually done so; instead, "there is no legal requirement that grandfathered plans ever be phased out." *Id.* at 2764, n.10.

Second, the statute provides that employers with fewer than fifty employees are not required to offer insurance at all. See 26 U.S.C. 4980H(c)(2)(A). These small employers—who collectively employ an estimated 34 million Americans—can avoid the mandate by not offering insurance. *Hobby Lobby*, 134 S.Ct. at 2764.

Third, after an initial outcry, HHS recognized that its mandate implicated sincere religious objections and created a regulatory exemption for certain "religious employers." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); 45 C.F.R. 147.131(a). This exemption is available to tens of thousands of churches and "integrated auxiliaries," a category defined by how a ministry is funded and how closely it is controlled by a church. 26 C.F.R. 1.6033-2(h). A "religious employer" need not do anything to avail itself of this exemption; it need not certify its religious beliefs, execute or deliver any forms, provide notice to HHS or any other government authority, or do anything that would allow anyone to seize its employee healthcare infor-

mation and plan infrastructure to provide contraceptive coverage.

Nonprofit Religious Organizations and the Mandate

Although HHS was well aware that religious objections to the mandate were by no means limited to houses of worship or their "integrated auxiliaries," it nonetheless refused to exempt other nonprofit religious organizations from the contraceptive mandate. Countless faith-based charities, orders of nuns, religious colleges and seminaries, and other religious organizations remain subject to the mandate. HHS attempted to justify that decision on the theory that houses of worship "are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39,874. So instead of exempting these nonprofit employers, HHS created another way for them to "comply" with the mandate. *Id.* at 39,879 ("an eligible organization is considered to comply with section 2713 of the PHS Act"); accord 80 Fed. Reg. 41,318, 41,344 (July 14, 2015). To be clear, this so-called "accommodation" is not an exemption, but a means by which the nonprofit can *fulfill* its statutory obligation to provide coverage.

This regulatory compliance method requires a nonexempt religious employer to "self-certify" that it is a religious employer and has religious objections to providing some or all contraceptive methods. 26 C.F.R. 54.9815-2713AT(b)(ii)(A), (c)(1). That certification does not exempt the employer or its healthcare plan from the mandate. Instead, it "cause[s] the legal responsibility to provide contraceptive coverage to

shift" either to the employer's insurer or, for a self-insured employer (which many religious employers are), its TPA, App.48a, 80a, to make "separate payments for contraceptive services directly for plan participants and beneficiaries." 78 Fed. Reg. at 39,876; see 26 C.F.R. 54.9815-2713AT(b)(2), (c)(2). In other words, unlike the exemption provided to grandfathered plans and other religious employers, the "accommodation" does not excuse the employer from ensuring that participants in its plan receive contraceptive coverage in connection with that plan. It instead provides a regulatory mechanism that still requires the employer to satisfy both the statutory obligation to provide preventative care and the regulatory obligation to provide contraceptive coverage.

Originally, objecting nonprofits had only one method of "self-certifying": executing and delivering to their insurer or TPA the Employment Benefits Security Administration Form 700. App.24a. Execution of this document is critical not only to discharging the employer's statutory/regulatory obligation, but also to the actual provision of the objected-to coverage. As the form states, upon execution and delivery, it becomes "an instrument under which the plan is operated." App.261a. It designates the TPA as "plan administrator and claims administrator," not generally, but "solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. 2510.3-16(b), (c).

That designation is essential because without it, a TPA would have no contractual authority to utilize plan information to pay *any* claims (let alone claims

for contraceptives excluded from the employer's plan), or the legal authority to use plan information for that purpose. And self-funded plans generally can be modified only by a written document, as a matter of both contract law and, where applicable, ERISA. 29 U.S.C. 1102(a)(1). Form 700 thus is necessary not only to trigger the regulatory obligation of the insurer or TPA to provide contraceptive coverage to the organization's employees, but also to "ensure[] that there is a party with legal authority"—both contractually and under ERISA—to make payments to plan beneficiaries for contraceptive services. 78 Fed. Reg. at 39,880. Additionally, only upon execution of this form does the insurer or TPA become authorized and legally obligated to provide such coverage, and (in the case of a TPA) eligible for 115% reimbursement for doing so. See 79 Fed. Reg. 13,744, 13,809 (Mar. 11, 2014).

As HHS has acknowledged, forcing an employer to amend its plan documents to create this authority and obligation does not create "two separate health insurance policies." 78 Fed. Reg. at 39,876. Indeed, the government would not be able to use ERISA to help accomplish its goals if it were not regulating a benefit plan provided by an employer. 29 U.S.C. 1002. Instead, the "accommodation" is designed to effectuate contraceptive coverage from *inside* the employer's "insurance coverage network," to take advantage of the existing "coverage administration infrastructure." 80 Fed. Reg. at 41,328. In short, it is designed to force a religious employer to allow its own plan to be used to facilitate access to the very contraceptive coverage that it finds religiously objectionable.

The Little Sisters and this Court's Injunction

Unsurprisingly, religious organizations found little solace in this "accommodation." After all, these organizations do not merely object to paying for or being the direct provider of contraceptive coverage; they object to facilitating, or being complicit in, access to contraceptives; to paving the way for contraceptives to be provided under their plans; and to directly transferring their own obligations onto others. Being forced to "comply" with the mandate via the regulatory "accommodation" is no more compatible with their religious beliefs than being forced to comply with that mandate directly.

The Little Sisters are one group raising such objections. The Little Sisters are part of an international order of Catholic nuns whose faith inspires them to spend their lives serving the sick and elderly poor. Each Little Sister takes a vow of obedience to God and of hospitality "to care for the aged as if they were Christ himself." LSP C.A.App.149a, 151a. The Little Sisters treat each "individual with the dignity they are due as a person loved and created by God," and strive to "convey a public witness of respect for life, in the hope that [they] can build a Culture of Life in our society." LSP C.A.App.152a.

The Little Sisters provide health benefits through Christian Brothers Employee Benefit Trust (Trust), a self-insured church plan. A "church plan" is a benefit plan established by a church to serve its employees and other nonprofit religious organizations that share "common religious bonds and convictions." 29 U.S.C. 1002(33); 26 U.S.C. 414(e). The Trust's church plan is open only to nonprofits in good standing with

the Roman Catholic Church and approved for listing in *The Official Catholic Directory*. LSP C.A.App.165a. The plan is administered by petitioner Christian Brothers Services, a Catholic organization that serves other Catholic organizations by helping them to "remain faithful to [their] mission and the universal mission of the Catholic Church." LSP C.A.App.166a. Consistent with the sincerely held religious beliefs of the Catholic Church, the Trust does not provide contraceptive coverage. LSP C.A.App.169a.

When HHS was considering religious objections to its contraceptive mandate, commenters repeatedly requested that church plan participants be exempted from compliance.[1] HHS refused. Nonexempt employers who use a church plan therefore must comply with the mandate, either including contraceptive coverage in their plan or executing documents authorizing others to use their plan infrastructure to facilitate that coverage. 80 Fed. Reg. at 41,344; 26 C.F.R. 54.9815-2713A(a)(3).

There is, however, one important difference as to church plans. Because church plans are exempt from ERISA, 29 U.S.C. 1003(b)(2), HHS claims that it lacks authority to compel a church plan's TPA to comply with the obligation to provide contraceptive coverage that arises if an employer that utilizes the plan self-certifies. In HHS's own view, forcing an em-

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[1] Letter, Church Alliance to Dep't of Labor (Oct. 27, 2014) (summarizing comments submitted from 2011 to 2014) http://church-alliance.org/sites/default/files/images/u2/Comment-Letter-ACA-Preventive-Services-IFR-10-27-14.pdf.

ployer that uses a church plan to self-certify will not necessarily result in the provision of contraceptive coverage to its employees. This is a case in point. Christian Brothers Services has made clear that, because of its own religious objections, it would not comply with the obligation to provide contraceptive coverage if the Little Sisters were to self-certify, and HHS has disclaimed any enforcement authority to force it to do so. Nonetheless, HHS still insists that the Little Sisters must comply with the mandate via the "accommodation" even though HHS does not dispute either that they have a sincere religious objection to doing so, or that their objection exists independently of whether doing so will result in the provision of contraceptive coverage to their employees. LSP C.A.App.160a, 343a-48a, 352a-53a.[2]

The Little Sisters and Christian Brothers brought suit on behalf of themselves and a class of all employers in the Trust alleging that forcing them to comply with the mandate via the "accommodation" violates, among other things, their religious freedom rights under RFRA. After both the district court and

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[2] It is not necessarily true, moreover, that complying via the regulatory option would *not* result in the use of the Little Sisters' plan to facilitate provision of contraceptive coverage. As HHS conceded below, if the Little Sisters execute the requisite paperwork, HHS will consider itself empowered to convince *any* third party with which the Trust contracts to utilize the Little Sisters' plan to facilitate the provision of contraceptive coverage. LSP C.A.Tr.51:2-19; RSI C.A.Tr.18:2-19 (admitting at oral argument that HHS "will make that offer to Express Scripts"). Express Scripts is the Trust's prescription provider and does not share the Trust's religious objections. LSP C.A.App.495a.

the Tenth Circuit refused to grant preliminary injunctive relief mere days before fines would begin accruing, the Little Sisters turned to this Court for relief. This Court responded by issuing a rare injunction under the All Writs Act excusing them from executing Form 700 and ordering:

> If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions of the [ACA] and related regulations pending final disposition of the[ir] appeal.

App.150a. The Court subsequently ordered similar relief in *Wheaton College* v. *Burwell*, 134 S.Ct. 2806 (2014).

The "Augmented" Regulatory Method for Compliance with the Contraceptive Mandate

HHS responded to this Court's injunctions by revising its regulation in form but not substance, and continuing to require objecting nonprofits to execute documents that HHS deems sufficient for compliance with the mandate. Specifically, HHS "augmented" the regulation to allow a nonprofit to communicate its objection through HHS instead of directly to its insurer or TPA. Just as with Form 700, however, this method of compliance is not an exemption. Nor, unlike the relief this Court ordered, does it consist solely of informing HHS of a religious objection. Instead,

like Form 700, it creates "an instrument under which the plan is operated." App.264a.

To that end, the notice must inform HHS of the name and type of the employer's health plan, as well as "the name and contact information for any of the plan's [TPAs]." 80 Fed. Reg. at 41,344. "If" the religious organization submits this "necessary" information, HHS "will send a separate notification to" its insurer or TPA informing of its new "obligations" to provide contraceptive coverage to participants in the organization's plan and its designation as a plan and claims administrator for that purpose. 79 Fed. Reg. 51,092, 51,095 (Aug. 27, 2014); 29 C.F.R. 2510.3-16(b). If the employer takes these steps, it will authorize the use of its plans to provide no-cost access to the contraceptives, and HHS will deem the employer in compliance.

Whether an employer executes Form 700 or provides notice and information to HHS, "[t]he result is the same." *East Tex. Baptist Univ.* v. *Burwell,* No. 14-20112, 2015 WL 3852811, at *2 (5th Cir. June 22, 2015) (*"ETBU"*). The religious organization is deemed to have complied with the mandate to provide coverage to which it objects; its own healthcare plan becomes the vehicle for facilitating that coverage; and its own certification or notice serves as the legal "instrument" that triggers and authorizes provision of and reimbursement for that coverage. Only by taking the affirmative act of executing a legal "instrument" that puts itself in that position can a religious organization avoid massive financial penalties for excluding any contraceptives from its plan.

The Tenth Circuit Proceedings

After obtaining the injunction pending appeal from this Court, the Little Sisters and Christian Brothers proceeded with their appeal of the district court's denial of injunctive relief, and the Tenth Circuit aligned oral argument on that appeal with HHS's appeal of preliminary injunctive relief in another case, *Reaching Souls Int'l, Inc.* v. *Burwell*, No. 14-6028 (10th Cir.).[3]

Like the *Little Sisters* case, the *Reaching Souls* case involves both a church plan (GuideStone) and a class of religious employers who use that plan. Because plan sponsor GuideStone and those employers object to the four forms of contraception that can act as abortifacients, the plan does not provide coverage for those forms of contraception. RSI C.A.App.A162-71, A181-83, A190-91. The largest TPA with which GuideStone contracts has stated that should any of the employers who use GuideStone comply with the contraceptive mandate via the "accommodation," the TPA will communicate to that organization's employees (and their female beneficiaries, starting at age 10) that those abortifacients are available through the GuideStone plan. RSI C.A.App.A317, A321. And the TPA would facilitate that coverage by using GuideStone's plan infrastructure to contact all participants, identify participants by "payroll location," and perform "[o]ngoing, nightly feeds" of information. RSI C.A.App.A321.

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[3] The court also aligned argument in another HHS appeal. *Southern Nazarene Univ.* v. *Burwell*, No. 14-6026 (10th Cir.).

After hearing argument, the Tenth Circuit rejected petitioners' claims. As to their RFRA claims, the court accepted petitioners' uncontested testimony that "the accommodation scheme violates their sincerely held religious beliefs" that they may not be "complicit in providing contraceptive coverage." App.35a, 38a, 48a. And the court agreed that if petitioners do not comply, either directly or via the "accommodation," they will face massive penalties. But the majority nonetheless found no substantial burden because it "assesse[d] and ultimately reject[ed] the merits of" petitioners' sincere religious beliefs that complying via the "accommodation" would force them to be morally complicit in providing contraceptive coverage; instead, in the court's eyes, doing so would "relieve them from complicity." App.48a & n.20. The court also rejected petitioners' Free Exercise and Establishment Clause claims.

Judge Baldock dissented in part. He expressed considerable doubt that courts may "question[] a religious adherent's understanding of the significance of a compelled action," App.124a, and even if courts could so question, he concluded that the "accommodation" would violate RFRA as to self-insured employers. In his view, because "the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts," the accommodation route imposes "a substantial burden on their religious exercise" even under the majority's conception of the analysis. App.137a, 146a. But because he accepted "for argument's sake" that a plaintiff must show that the actions forbidden by its religion would "necessarily cause" contraceptive coverage to demonstrate a substantial burden, he concluded that the

Little Sisters' RFRA claim fails because Christian Brothers Services does not intend to provide contraceptive coverage should the Little Sisters comply via the "accommodation." App.145a.

REASONS FOR GRANTING THE PETITION

I. This case presents an exceptionally important question.

This case presents a question of profound and nationwide importance. There is no dispute that thousands of religious organizations throughout the country sincerely believe that complying with the mandate to provide healthcare coverage that includes abortifacients and contraceptives, either directly or via the "accommodation," violates their religious beliefs. And there is no dispute that unless these religious employers comply, they will face massive financial penalties. In short, there is no dispute that many religious ministries are being forced to choose between violating their sincere religious beliefs or violating federal law.

Understandably, this unprecedented situation has generated an unprecedented volume of litigation. Hundreds of religious institutions representing a wide cross-section of organizations and faiths have brought lawsuits seeking relief from the untenable position in which HHS has put them.[4] None of this

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[4] See Becket Fund for Religious Liberty, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/; National Women's Law Center, *Challenges to the Birth Control Coverage Benefit*, http://www.nwlc.org/status-lawsuits-challenging-affordable-care-acts-birth-control-coverage-benefit.

should be surprising. Traditionally, the government has steered clear of mandating coverage as religiously sensitive as contraceptives and abortifacients, and has provided generous conscience clauses when mandates threaten to intrude upon religious beliefs, thus leaving religious organizations free to decide how to provide their employees with healthcare plans that comply with their religious beliefs.

The promulgation of a regulatory mandate requiring a wide swath of religious employers to provide healthcare coverage that includes contraceptives and abortifacients changed all that. Religious employers made it perfectly clear to HHS that compliance with this unprecedented regulatory mandate would violate their sincerely held beliefs. Yet HHS refused to exempt them, even though thousands of other employers have been exempted for reasons ranging from religious conscience to administrative convenience. Instead, HHS created only an alternative method for those employers to *comply* with the mandate to provide the coverage that HHS desires and that the employers' religions forbid. Religious employers once again made clear that providing such coverage, whether directly or via the "accommodation," would violate their religion.

Many of the lawsuits that followed, including one of the two cases here, met with success in the district courts. But in contrast to the district courts that found a RFRA violation based on a straightforward application of *Hobby Lobby*, the Third, Fifth, Seventh, D.C., and now Tenth Circuits concluded that using substantial penalties to force religious employers to comply with the mandate via the "accommoda-

tion" does not violate RFRA, even though doing so undisputedly would violate their sincere religious beliefs. Courts have done so, moreover, by employing a substantial burden analysis virtually identical to the reasoning this Court squarely rejected in *Hobby Lobby* and cases before it. See *infra* Part II. Those circuit decisions are profoundly flawed, but what matters at this juncture is not who is correct about the ultimate merits of this important and recurring nationwide controversy. What matters now is that, as a consequence of decisions like the one below, religious employers throughout the nation face the imminent prospect of being forced to choose between violating their sincere religious beliefs or violating the ACA.

That is reason enough for this Court to intervene now, rather than to allow this exceptionally important question to "percolate" while ministries face the abandonment of the free exercise rights that RFRA guarantees. This Court has already recognized—repeatedly—that this extraordinary situation demands extraordinary action. Three times, including once at the behest of the Little Sisters, the Court has been asked to provide extraordinary relief under the All Writs Act to prevent a religious nonprofit from being forced to comply with the mandate through HHS's "accommodation" before exhausting judicial review. And three times, this Court has complied, most recently by issuing an injunction pending resolution of a petition for *certiorari* challenging HHS's "augmented accommodation" in *Zubik* v. *Burwell*, 576 U.S. ---, 2015 WL 3947586 (June 29, 2015). See also App.261a; *Wheaton*, 134 S.Ct. 2806. As the Court has thus recognized, the stakes are simply too high to allow HHS to begin enforcing its novel regu-

latory scheme before its legality has been fully and finally litigated.

And this case is a particularly appropriate vehicle for this Court to play its essential role in that process. While petitioner Reaching Souls faces the more familiar dynamic in which compliance with HHS's regulatory demands will more likely accomplish HHS's regulatory goal of ensuring the provision of no-cost contraceptives via petitioner's plan, HHS's position vis-à-vis petitioner Little Sisters illustrates HHS's insistence that sincerely held religious beliefs must yield even when HHS says its regulatory objectives cannot be enforced. HHS has insisted that even if the Little Sisters sign the paperwork authorizing and obligating their TPA to provide their employees with contraceptive coverage, the government still cannot ensure that coverage will be provided because it currently lacks enforcement authority to do so. HHS seems to think that its current inability to achieve its regulatory objective somehow defeats the Little Sisters' religious objection.[5] In reality, since the government concedes the sincerity of Little Sisters' objection to filling out the requisite forms, HHS demonstrates only its willingness to override sincere religious beliefs even when it thinks doing so does not further its interests in the least. If nothing else, RFRA and the First Amendment must mean that the government cannot penalize religious institutions for no reason at all. Yet even in that circumstance, HHS still refuses to relent. Thus, as applied to Little Sis-

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[5] But see note 2, *supra*.

ters, the contraceptive mandate is as clear a RFRA violation as one can imagine.

That makes this Court's review of this particular case essential. Even accepting for the sake of argument the premise that the regulatory compliance method might survive a least restrictive means analysis when compliance will likely result in the provision of no-cost contraceptives (as in the Reaching Souls scenario), but see *infra* pp. 31-33, it certainly cannot survive that exceptionally demanding test when the government claims that overriding sincere religious beliefs will not even accomplish the government's objective (as in the Little Sisters scenario). This petition allows the Court to consider both scenarios together, rather than just the Reaching Souls scenario common to other petitions.[6] But even if this Court grants *certiorari* in one of the other pending petitions, it should grant the instant petition to ensure that HHS's insistence on overriding sincere religious beliefs even when it says its regulatory objective is unattainable does not escape this Court's review.

But ultimately, whether through this petition alone or some combination of petitions, what matters is that the Court resolve this exceptionally important

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[6] Moreover, this petition is unique in that it involves claims not just by employers, but also by the church plans themselves (the Trust and GuideStone) as well as a TPA (Christian Brothers Services), thereby ensuring the Court the fullest insight into how the "accommodation" appropriates a church plan's "coverage administration infrastructure." 80 Fed. Reg. 41,322 n.22, 41,328; see also RSI C.A.App.A317-A322.

question, and do so now. The arguments for each side have been exhaustively briefed and thoroughly considered by courts across the country, and hundreds of petitioners now stand before this Court. Unless they receive relief from this Court, they are out of options; they will be forced to choose between compliance with the mandate or compliance with their religious beliefs. That is precisely the type of impossible choice that Congress intended RFRA to protect against in all but the narrowest of circumstances. This Court should not let that extraordinary result come to pass without deciding for itself whether HHS's unprecedented effort to override sincere religious objections to actions that HHS itself considers sufficient to comply with the mandate can be reconciled with RFRA.

II. The decision below is exceptionally wrong.

This Court's intervention is all the more essential because the decision below is profoundly wrong. Indeed, the reasoning the Tenth Circuit employed in concluding that HHS has not imposed a substantial burden on petitioners' exercise of religion is impossible to reconcile with *Hobby Lobby* and decades of substantial burden cases before it.

1. As noted, there is no dispute that petitioners sincerely believe that complying with the mandate, whether directly or via the "accommodation," is forbidden by their religions. Nor is there any dispute that failure to comply will result in massive fines. That should be the end of the substantial burden analysis, as forcing petitioners to choose between taking an action that they sincerely believe would violate their religion or "pay[ing] an enormous sum of

money" "clearly imposes a substantial burden on" their exercise of religion. *Hobby Lobby*, 134 S.Ct. at 2779. That is so whether or not courts *agree* with petitioners that the action would (or should) violate their religion. And it is particularly so where, as here, the *reason* HHS states for needing compliance (namely, to expand contraceptive access) exactly matches petitioners' religious concerns.

Yet the Tenth Circuit still refused to accept that HHS has imposed a substantial burden on petitioners' religious exercise. In doing so, the panel did not dispute that petitioners sincerely believe that compliance with the mandate via the regulatory method would force them to facilitate contraceptive coverage in violation of their religious beliefs, or that the consequences of non-compliance are massive penalties. Instead, the court insisted that the substantial burden analysis turns not on whether petitioners are being pressured to take religiously forbidden actions, but rather on whether, in the court's view, the religiously objectionable law adequately relieves them of moral complicity. The court thus rejected petitioners' RFRA claims because it concluded that they are simply wrong to believe that "the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme." App.48a. Unlike petitioners, the court thought that complying with the "accommodation" scheme actually "relieves [petitioners] from complicity," App.48a, and in any event is not very burdensome because it requires only "routine and minimal administrative paperwork." App.91-92a.

That approach—judges telling nuns how to analyze moral complicity—cannot be reconciled with this Court's substantial burden jurisprudence. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who sincerely objects to a law on religious grounds has "correctly perceived the commands of [his] * * * faith." *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981). After all, "[c]ourts are not arbiters of scriptural interpretation," and they are "singularly ill equipped" to make sensitive decisions about what does or does not interfere with religious beliefs—*e.g.*, whether the degree of complicity required is religiously problematic. *Id.* at 715-16. This Court has made clear that "[h]eresy trials are foreign to our Constitution" and religious groups "may believe what they cannot prove." *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). The only questions for courts to resolve in the substantial burden analysis are whether a religious belief is sincerely held and, if so, whether the "pressure" the government has "put[] * * * on an adherent to modify his behavior and to violate his beliefs" is "substantial." *Thomas*, 450 U.S. at 718; see also *United States* v. *Lee*, 455 U.S. 252, 257 (1982).

Hobby Lobby eliminated any doubt on that score. Just as here, "HHS's main argument" concerning substantial burden in *Hobby Lobby* "[wa]s basically that the connection between what the objecting parties must do * * * and the end that they find to be morally wrong * * * [wa]s simply too attenuated." 134 S.Ct. at 2777. Rather than resolve that argument as part of its substantial burden analysis, the Court found it entirely misplaced, as it "addresses a very different question that the federal courts have no

business addressing," and that the Court itself has "repeatedly refused" to answer. 134 S.Ct. at 2778 (collecting cases). The "difficult and important question" of where to draw "the line" as to what is "consistent with [one's] religious beliefs"—including how much facilitation or complicity is too much—is for the religious adherent alone to answer. *Ibid.* The only questions the Court found relevant to its substantial burden analysis were whether "the line drawn" by the challengers "reflect[ed] an honest conviction" and, if so, whether HHS had substantially pressured them to cross that line. *Ibid.* And, the Court concluded, putting employers to the choice of crossing that line or "pay[ing] an enormous sum of money" unquestionably substantially pressures them to cross that line. *Id.* at 2779.

That same reasoning compels the conclusion that the nonprofit compliance method imposes a substantial burden. Indeed, the burden here is not just analogous to the burden in *Hobby Lobby*; it is identical. The ultimate statutory obligation with which petitioners must comply remains the contraceptive mandate, and the penalties for failure to do so—whether directly or via the "accommodation"—are the same as those faced by the for-profit employers in *Hobby Lobby*. The only difference is that HHS has given petitioners a method for fulfilling the mandate that was not initially offered to for-profit corporations. But as long as petitioners have sincere religious objections to the proffered means of fulfilling the mandate, then the existence of a substantial burden follows ineluctably from *Hobby Lobby*.

Indeed, several judges have recognized as much. See, *e.g.*, *Eternal Word Television Network* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1348 (11th Cir. 2014) (Pryor, J., concurring) ("*EWTN*") ("So long as the [religious organization's] belief is sincerely held and undisputed—as it is here—we have no choice but to decide that compelling the participation of the [organization] is a substantial burden on its religious exercise."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, No. 13-5368, (D.C. Cir. 2015), slip op. 10 (Kavanaugh, J., dissenting from denial of rehearing en banc) ("*PFL*") ("we may not question the wisdom or reasonableness (as opposed to the sincerity) of plaintiffs' religious beliefs—including about complicity in wrongdoing"); *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting), vacated and remanded, 135 S.Ct. 1528 (2015) (whether the "accommodation" imposes a substantial burden "is not a question of legal causation but of religious faith"); *cf.* App.123a (Baldock, J., dissenting in part) ("learned judges have argued compellingly that, under [*Hobby Lobby*], the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA").

Unfortunately, when it comes to nonprofit challenges to the contraceptive mandate, adherence to the clear teachings of *Hobby Lobby* and *Thomas* has become a feature more common to dissenting opinions than majorities. Indeed, each of the five courts of appeals that have resolved such challenges (including

the Tenth Circuit here) has employed a substantial burden analysis reminiscent of *Hobby Lobby* dissenters. See *ETBU*, 2015 WL 3852811, at *5 (finding no substantial burden because "the acts [religious objectors] are required to perform do not include providing or facilitating access to contraceptives"); *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 435 (3d Cir. 2015) (insisting that RFRA requires courts to "objectively assess whether the appellees' compliance with the self-certification procedure does, in fact * * * make them complicit" in facilitating coverage); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 611-12 (7th Cir. 2015) (Posner, J.) (*"Notre Dame II"*) ("[it] is for the courts to determine whether the law actually forces [employers] to act in a way that would violate [their] beliefs"); *Wheaton Coll.* v. *Burwell*, No. 14-2396, 2015 WL 3988356, at *7 (7th Cir. July 1, 2015) (Posner, J.) ("No one is asking Wheaton to violate its religious beliefs."); *Priests for Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 237, 247 (D.C. Cir. 2014) (insisting that "accommodation" route requires only "a bit of paperwork" that "wash[es] [employers'] hands of any involvement in providing [contraceptive] coverage").

Like the decision below, those cases simply cannot be reconciled with this Court's repeated admonition that "[i]t is not within 'the judicial function and judicial competence'" to decide the "proper interpretation" of religious beliefs or "speculate whether" the peculiarities of a law's operation "ease or mitigate the perceived sin of participation." *Lee*, 455 U.S. at 257, 261 n.12 (quoting *Thomas*, 450 U.S. at 716). Just this past Term, applying RLUIPA's identical substantial burden test, this Court found it sufficient that an in-

mate demonstrated that he would "face serious disciplinary action" if forced to shave a beard that he sincerely believed his religion required. *Holt* v. *Hobbs*, 135 S.Ct. 853, 862 (2015). The Court spent no time evaluating whether maintaining a half-inch beard was necessary or sufficient to comply with a "dictate of [petitioner's] religious faith." *Ibid.* Nor did it focus on the fact that shaving takes only a few minutes. It was enough that petitioner's belief was sincere and that the government had substantially pressured him to violate it.

Holt also reiterated that it makes no difference whether the challenger remains "able to engage in *other* forms of religious exercise," *ibid.* (emphasis added), as RFRA protects "any exercise of religion," not merely partial or compromised exercises. 42 U.S.C. 2000cc-5(7)(A). That the regulatory method "provides an alternative" means of compliance with the contraceptive mandate that avoids *one* religious objection (*i.e.*, direct payment) is of no moment since the "alternative itself imposes a substantial burden." *PFL*, slip op. 14 (Kavanaugh, J., dissenting). But see App.42a-44a (suggesting that a less stringent analysis applies when government purports to be "accommodating" religious exercise). And when, as here, the alternative violates religious beliefs that are every bit as sincere as those at stake in *Hobby Lobby*, then *Hobby Lobby* plainly controls the substantial burden inquiry. That the Tenth Circuit (and others) failed to recognize as much is proof enough of the need for this Court's review.

2. To make matters worse, courts not only have impermissibly arrogated to themselves authority to

answer "a difficult and important question of religion and moral philosophy," *id.* at 2778, but have failed to grasp the true nature of the religious objections. These cases are not about whether HHS may force religious employers to execute "routine and minimal administrative paperwork." App.91a-92a. Nor are they about whether religious employers may prevent employees from obtaining access to contraceptives. They are about whether HHS may force objecting religious employers to comply with a mandate to provide contraceptive coverage to their employees in a "seamless" way, by interjecting that coverage into the employer's own "insurance coverage network" and utilizing the plan's own "coverage administration infrastructure." 80 Fed. Reg. at 41,328.

HHS would seem to be poorly positioned to question that its compliance method involves a meaningful degree of complicity or facilitation. After all, HHS does not view its "accommodation" as an exemption from its regulatory mandate. Instead, the required documentation is viewed as a means both of expanding contraceptive access and of complying with the mandate. Having concluded that its "accommodation" is good enough (as a matter of administrative law) to put petitioners in compliance with their regulatory and statutory obligations to provide no-cost contraceptive coverage, it takes real chutzpah for HHS to then insist that this same "accommodation" involves no meaningful facilitation or complicity in the provision of that coverage. The "accommodation" cannot simultaneously "ensure" contraceptive coverage and have nothing to do with it. In any case, it is all well and good for HHS to think *it* has threaded the needle and found a way for religious nonprofits to comply

with the mandate without violating their religious beliefs, but ultimately it is for the religious adherent to determine how much facilitation or complicity is too much.

Just like its need to ensure that its "accommodation" complies with the ACA, HHS's need to ensure that its "accommodation" complies with ERISA (as well as the APA and HIPPA) likewise ensures that the degree of complicity and facilitation is substantial. That much is clear from the fact that the form or notice HHS requires employers to execute serves as "an instrument under which [its healthcare] plan is operated." App.264a. That instrument is essential to "ensure[] that there is a party with legal authority" to make payments for contraceptive services, 78 Fed. Reg. at 39,880, as a TPA would have no contractual authority to pay claims without it—or legal authority to either use plan information for that purpose or seek government reimbursement for doing so. It is that "gate-opening act" of executing that instrument—not the independent actions of any third parties—that petitioners sincerely believe would violate their religious beliefs. See App.138a (Baldock, J., dissenting in part). The situation thus is not meaningfully different from one in which the government mandates that all hospitals perform abortions, but purports to "accommodate" religious hospitals by requiring them to sign a form authorizing doctors supplied and paid by the government to perform abortions in the hospitals' surgical suites. It is not hard to see why a hospital would find little solace in the government's moral analysis that it is not "facilitating" abortion because its own doctors are not the ones

that the hospital has authorized to use its facility to perform abortions.[7]

The Tenth Circuit was therefore simply wrong to insist that HHS's regulatory compliance method would "relieve[] [petitioners] of complicity." App. 48a. Indeed, "if the form were meaningless, why would the government require it?" *PFL*, slip op. 12 (Kavanaugh, J., dissenting). But ultimately, who has the better of the complicity and facilitation arguments is beside the point. What matters under RFRA and this Court's cases is that petitioners *sincerely believe* that complying via the "accommodation" would be sinful, and that HHS nonetheless is exerting substantial economic pressure—the exact same pressure as in *Hobby Lobby*—on petitioners to do so. No matter which petitioner or plan type is at stake, the substantial burden analysis requires nothing more.

3. In employing a fundamentally flawed substantial burden analysis, the Tenth Circuit avoided the only question left open by *Hobby Lobby*—whether the regulatory nonprofit "accommodation" is "the least restrictive means of furthering [a] compelling governmental interest," 42 U.S.C. 2000bb-1. Many of the judges who have reached that question have readily

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[7] And in this hypothetical, the government could hardly save its "accommodation" by insisting that independent obstacles will prevent the doctors from actually showing up at certain hospitals. Even if true, this would not undermine the religious hospitals' objection to signing the form that opens their doors to abortions; it would just mean that the government is impermissibly disregarding religious beliefs even when doing so does not further its objectives.

concluded that it is not. See, *e.g.*, *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring); *PFL*, slip op. 17 (Brown, J., dissenting); *id.* at 23 (Kavanaugh, J., dissenting), *Notre Dame II*, 786 F.3d at 629-30 (Flaum, J., dissenting); App.147a-48a (Baldock, J., dissenting in part).

And with good reason, as HHS has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors," *Korte* v. *Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). Most obviously, it could simply "treat employees [of religious objectors] * * * the same as it does employees whose employers provide no coverage" by "providing for subsidized * * * contraceptive coverage * * * on [the] exchanges." *PFL*, slip op. 17 (Brown, J., dissenting). Moreover, it is hard to see how HHS can claim a "compelling interest" in enforcing a mandate that "does not apply to tens of millions of people * * * includ[ing] those working for private employers with grandfathered plans, for employers with fewer than fifty employees," and for certain religious employers. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013); see also *Korte*, 735 F.3d at 686; *Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1220-22 (D.C. Cir. 2013), vacated and remanded, 134 S.Ct. 2902 (2014); *EWTN*, 756 F.3d at 1349 (Pryor, J., concurring). And it is even harder to see how HHS can claim a compelling—or even legitimate—interest in enforcing the mandate over sincere religious objections in the scenario where it says doing so will not even result in the provision of contraceptive coverage.

That makes this Court's review all the more essential, as the Tenth Circuit dodged the least restrictive means analysis by failing to employ the substantial burden test that this Court's precedents demand. And for employers in the Little Sisters' shoes, the substantial burden test really is the end of the RFRA analysis. It is bad enough that HHS's unprecedented effort to force religious employers to take actions that violate their sincerely held religious beliefs escaped meaningful RFRA review in the Tenth Circuit. Petitioners should not be denied meaningful review in this Court as well before being forced to make the untenable choice that HHS has thrust upon them.

III. The "accommodation" discriminates among religious organizations in violation of the Religion Clauses.

This Court should also grant *certiorari* to review the constitutionality of HHS's unprecedented decision to discriminate among religious objectors in doling out exceptions to its contraceptive mandate. Such arbitrary religious discrimination is impermissible, and particularly inappropriate coming from an agency that has neither the authority nor the expertise to decide which religious institutions are sufficiently "religious" to deserve accommodation. Indeed, while RFRA reflects a congressional mandate to accommodate all religious exercise pursuant to broadly applicable principles, HHS has taken it upon itself to exempt certain religious entities, while insisting that others comply, without following any congressional guidance. Small wonder that the result of deviating from RFRA's uniform approach is unconstitutional

cere beliefs be treated on equal terms. And just as the government may not privilege "well-established churches" while disadvantaging "churches which are new and lacking in a constituency," *Larson*, 456 U.S. at 246 n.23, it may not prefer "houses of worship[] and religious orders," 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013), while disfavoring those whose faith "move[s] [its adherents] to engage in" broader religious ministries. *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Such preferences have been "consistently and firmly" rejected. *Larson*, 456 U.S. at 246; *see also Korte*, 735 F.3d at 681 (rejecting argument that "[r]eligious exercise is protected in * * * the house of worship but not beyond" because many "[r]eligious people do not practice their faith in that compartmentalized way"). As the government recently—and successfully—argued, "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "create a serious Establishment Clause problem." Gov't Amicus Br. at 11, *Spencer* v. *World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08-35532).

HHS does not deny that it has discriminated among religious organizations. Instead, it argues that its discrimination is justified because "[h]ouses of worship and their integrated auxiliaries * * * are more likely than other employers to employ people of the same faith," and therefore "less likely" to hire people who need contraceptives. 78 Fed. Reg. at 39,874. But HHS has offered exactly zero factual support for this speculation—and for good reason, as it is just as unfounded as the rationales this Court

rejected in *Larson*, 456 U.S. at 246-51, and *Lukumi*, 508 U.S. at 546-47. The Catholic petitioners' employees all work for openly Catholic institutions approved for listing in *The Official Catholic Directory*, and Reaching Souls and Truett-McConnell require employee statements of faith. LSP C.A.App.165a, RSI C.A.App.A15-17. There is no reason to suspect that the employees of these overtly religious institutions are any more likely to have religious disagreements with their employers than the employees of houses of worship.

Moreover, courts have been rightfully wary of allowing government to "discriminate[] among religious institutions on the basis of the * * * intensity of their belief." *Weaver*, 534 F.3d at 1249. And *HHS* certainly cannot claim either any particular authority or expertise to determine which religious organizations are "religious enough." *Cf. King* v. *Burwell*, No. 14-114, 2015 WL 2473448, at *8 (U.S. June 25, 2015) ("It is especially unlikely that Congress would have delegated this decision to the *IRS*, which has no expertise in crafting health insurance policy of this sort."). At the very least, if determinations about who must comply with the mandate are to turn on such religiously sensitive judgments, those determinations should be made by Congress.

But Congress has already spoken in RFRA, which among its many virtues avoids the discrimination among religions that inevitably results from HHS's ad hocery. That countless religious employers not among the happy few exempted by HHS are being forced to comply with the contraceptive mandate despite RFRA is ample cause for this Court's interven-

tion. That, in this case, HHS insists on overriding concededly sincere religious objections even when HHS itself does not believe forced compliance will actually advance its regulatory goals makes the need for this Court's intervention here particularly acute.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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JULY 2015

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

NO. 13-1540

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation; LITTLE SISTERS OF THE POOR, BALTIMORE, INC., a Maryland non-profit corporation, by themselves and on behalf of all others similarly situated; CHRISTIAN BROTHERS SERVICES, a New Mexico non-profit corporation; CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

PLAINTIFFS - APPELLANTS,

v.

SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

DEFENDANTS - APPELLEES

Appeal from the United States District Court for the District of Colorado (No. 1:13-cv-2611)

NOS. 14-6026 & 14-6028

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY; REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation; TRUETT-MCCONNELL COLLEGE, INC., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas nonprofit corporation,

PLAINTIFFS - APPELLEES,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF THE TREASURY,

DEFENDANTS - APPELLANTS.

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67 CATHOLIC THEOLOGIANS AND ETHICISTS; ALABAMA PHYSICIANS FOR LIFE; AMERICAN

ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN BIBLE SOCIETY; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; AMERICAN CIVIL LIBERTIES UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME); AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; ASIAN AMERICANS ADVANCING JUSTICE | AAJC; ASIAN AMERICANS ADVANCING JUSTICE | LOS ANGELES; ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; ASSOCIATION OF GOSPEL RESCUE MISSIONS; BLACK WOMEN'S HEALTH IMPERATIVE; CALIFORNIA WOMEN'S LAW CENTER, NATIONAL WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; CATHOLIC MEDICAL ASSOCIATION; CHRISTIAN LEGAL SOCIETY; CHRISTIAN MEDICAL ASSOCIATION; CHRISTIE'S PLACE; CONCERNED WOMEN FOR AMERICA; DR. R. ALBERT MOHLER, JR.; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; FEMINIST MAJORITY FOUNDATION; FORWARD TOGETHER; HIV LAW PROJECT; IBIS REPRODUCTIVE HEALTH; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE AND CHRISTIAN LEGAL SOCIETY; INTERNATIONAL MISSION BOARD OF THE

SOUTHERN BAPTIST CONVENTION; IPAS; LEGAL MOMENTUM; LIBERTY COUNSEL; LIBERTY UNIVERSITY; LIBERTY, LIFE, AND LAW FOUNDATION; LUTHERAN CHURCH - MISSOURI SYNOD; MERGER WATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE COLORADO; NARAL PRO-CHOICE WYOMING; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF CATHOLIC NURSES; NATIONAL ASSOCIATION OF EVANGELICALS; NATIONAL ASSOCIATION OF PRO LIFE NURSES; NATIONAL CATHOLIC BIOETHICS CENTER; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN AND AIDS COLLECTIVE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S LAW CENTER; PLANNED PARENTHOOD ASSOCIATION OF UTAH; PLANNED PARENTHOOD OF KANSAS AND MIDMISSOURI; PLANNED PARENTHOOD OF THE HEARTLAND; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; POPULATION CONNECTION; PRISON FELLOWSHIP MINISTRIES; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU); SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); SOUTHERN BAPTIST THEOLOGICAL SEMINARY; UNITED STATES CONFERENCE OF

CATHOLIC BISHOPS,
AMICI CURIAE.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:13-CV-02611-WJM-BNB) & The United States District Court for the Western District of Oklahoma (D.C. Nos. 5:13-CV-01015-F & 5:13-CV-01092-D)

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Thomas E. Perez, Jacob J. Lew, and United States Department of the Treasury.

Gregory S. Baylor, Alliance Defending Freedom, Washington, DC (Matthew W. Bowman, Alliance Defending Freedom, Washington, DC, David A. Cortman, Alliance Defending Freedom, Lawrenceville, Georgia, and Kevin H. Theriot, Alliance Defending Freedom, Leawood, Kansas, with him on the briefs), appearing for Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University.

Before MATHESON, MCKAY, and BALDOCK, Circuit Judges.

MATHESON, Circuit Judge.

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GLOSSARY

This opinion is heavily laden with terms from the applicable statute and regulations, types of health insurance arrangements, and names of numerous entities. We appreciate the challenge this presents to the reader and provide this glossary to help navigate the opinion.

Legal and Regulatory Terms:

ACA: The Affordable Care Act, which encompasses the Patient Protection and Affordable Care Act, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, enacted on March 30, 2010.

Accommodation scheme: A regulatory mechanism that allows religious non-profit organizations to relieve themselves of their obligation to provide contraceptive coverage for employees by either (a) sending a form to their health insurance issuer or third-party administrator or (b) sending a notification to the Department of Health and Human Services.

ANPRM: Advance Notice of Proposed Rulemaking, which an administrative agency may issue to notify the public it is contemplating rulemaking and to invite comments.

Departments: The Department of Health and Human Services, Department of Labor, and Department of

the Treasury, which collectively implement the ACA.

EBSA: The Employee Benefits Security Administration, an agency within the Department of Labor.

ERISA: The Employee Retirement Income Security Act, codified at 29 U.S.C. § 1001 *et seq.*, which is a federal law that sets minimum standards for certain employer-sponsored benefit plans.

Form 700: A standardized notification that religious non-profit organizations may send to their health insurance issuer or third party administrator under the accommodation scheme to self-certify they object to providing contraceptive coverage.

HHS: The Department of Health and Human Services, which is one of the three departments tasked with implementing the ACA and contraceptive coverage requirement.

HRSA: The Health Resources and Services Administration, an agency within HHS, which issued guidelines requiring coverage of all FDA-approved contraceptive methods under the ACA.

IOM: The Institute of Medicine, an independent body that reviewed evidence on women's preventive services and issued a report used by the HRSA in formulating its guidelines.

IRC: The Internal Revenue Code, codified at 26 U.S.C. § 1 *et seq.*, which is a comprehensive compilation of the federal tax laws.

Mandate: Regulations enacted under the ACA requiring employer-sponsored group health plans

to cover contraceptive services for women as a form of preventive care.

RFRA: The Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb-1 *et seq.*, which states that laws that substantially burden a person's exercise of religion are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

RLUIPA: The Religious Land Use and Institutionalized Persons Act, codified at 42 U.S.C. § 2000cc *et seq.*, which states that laws that substantially burden religious exercise through land use restrictions or restrictions on prisoners are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

Religious employers: As defined by reference to §§ 6033(a)(3)(A)(i) or (iii) of the IRC, employers that are organized and operate as non-profit entities and are churches, their integrated auxiliaries, conventions or associations of churches, or the exclusively religious activities of any religious order.

Religious non-profit organizations: Organizations that do not qualify as religious employers but are eligible for an accommodation from the contraceptive coverage requirement because they have religious objections to providing contraceptive coverage, are organized and operate as non-profit entities, hold themselves out as religious organizations, and self-certify that they satisfy these criteria. The Plaintiffs in these cases are religious non-profit organizations.

Health Insurance Terms:

Group health plan: A benefit plan established or maintained by an employer that provides health insurance to employees and their dependents either directly—a self-insured group health plan—or through a health insurance issuer—an insured group health plan.

Health insurance issuer: A health insurance company, service, or organization that must be licensed to engage in the insurance business and is subject to state laws regulating insurance.

Insured group health plan: A benefit plan in which the employer employs a health insurance issuer to assume the risk of providing health insurance.

Plan participants and beneficiaries: Individuals who are covered by a group health plan.

Self-insured group health plan: A benefit plan in which the employer assumes the risk of providing health insurance.

Self-insured church plan: A self-insured group health plan established by a church or association of churches covering the church or association's employees, which is not subject to regulation under ERISA unless it has elected to opt in to ERISA's provisions.

TPA: A third-party administrator, which is an entity that processes insurance claims and provides administrative services for employers with self-insured group health plans.

Plaintiffs and Related Entities:

Little Sisters of the Poor:

Little Sisters of the Poor: A religious non-profit organization that provides health care to employees through the Christian Brothers Employee Benefit Trust.

Christian Brothers Employee Benefit Trust: A self-insured church plan that is not subject to ERISA and uses Christian Brothers Services as its TPA.

Christian Brothers Services: The TPA for the Christian Brothers Employee Benefit Trust.

Southern Nazarene:

Southern Nazarene University: A religious non-profit organization that is self-insured up to $100,000 and provides health care to employees through Blue Cross Blue Shield for claims above $100,000.

Oklahoma Baptist University: A religious non-profit organization insured by Blue Cross Blue Shield of Oklahoma.

Oklahoma Wesleyan University: A religious non-profit organization insured by Community Care of Oklahoma.

Mid-America Christian University: A religious non-profit organization that provides health care to employees through plans provided by GuideStone Financial Resources.

Reaching Souls:

Reaching Souls: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

Truett-McConnell College: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

GuideStone Financial Resources: A religious non-profit organization that sponsors the GuideStone Plan and has arranged for TPAs to provide claims administration under that plan.

GuideStone Plan: A self-insured church plan that is not subject to ERISA and uses entities like Connecticut General Life Insurance Company, Highmark Health Services, and Express Scripts, Inc. as its TPAs.

I. INTRODUCTION

When Congress passed the Affordable Care Act ("ACA") in 2010, it built upon the widespread use of employer-based health insurance in the United States.[1] The ACA and its implementing regulations require employers who provide health insurance coverage to their employees to include coverage for certain types of preventive care without cost to the insured. The appeals before us concern the regulations that require group health plans to cover contraceptive services for women as a form of

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[1] A majority of the nonelderly population in the United States receives health insurance as a job benefit through an employer. *See* Melissa Majerol, Vann Newkirk & Rachel Garfield, *The Uninsured: A Primer – Key Facts About Health Insurance and the Uninsured in America*, The Kaiser Commission on Medicaid and the Uninsured, 1 (Jan. 2015), http://files.kff.org/attachment /the-uninsured-a-primer-key-facts-about-health-insurance-and-the-uninsured-in-america-primer.

preventive care ("Mandate").[2]

In response to religious concerns, the Departments implementing the ACA— Health and Human Services ("HHS"), Labor, and Treasury—adopted a regulation that exempts religious employers—churches and their integrated auxiliaries—from covering contraceptives. When religious non-profit organizations complained about their omission from this exemption, the Departments adopted a regulation that allows them to opt out of providing, paying for, or facilitating contraceptive coverage.[3] Under this regulation, a religious non-profit organization can opt out by delivering a form to their group health plan's health insurance issuer or third-party administrator ("TPA") or by sending a notification to HHS.

The Plaintiffs in the cases before us are religious non-profit organizations. They contend that

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[2] We use "Mandate" as shorthand for the ACA's employer mandate, which requires employers who offer health benefits to comply with the coverage requirements detailed in the ACA and its implementing regulations. This Mandate is distinct from the individual mandate at issue in National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012), which generally requires individuals to maintain health insurance.

[3] Plaintiffs object to the term "opt out" because their accommodation from the Mandate involves an act on their part—self-certification—that they deem objectionable. We believe "opt out" is accurate. Self-certifying for the accommodation expressly relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise. Under these conditions, the self-certification is accurately characterized as an "opt out." By definition, all opt-out mechanisms require some affirmative act by objecting parties.

complying with the Mandate or the accommodation scheme imposes a substantial burden on their religious exercise. The Plaintiffs argue the Mandate and the accommodation scheme violate the Religious Freedom Restoration Act ("RFRA") and the Religion and Speech Clauses of the First Amendment.[4]

Although we recognize and respect the sincerity of Plaintiffs' beliefs and arguments, we conclude the accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights. Exercising jurisdiction under 28 U.S.C. § 1292(a), we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F. Supp. 3d 1225 (D. Colo. 2013), and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene University v. Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), and *Reaching Souls International, Inc. v. Burwell*, No. CIV-13-1092-D, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013).

II. *HOBBY LOBBY* AND THIS CASE

Last year, the Supreme Court decided *Burwell v.*

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[4] RFRA applies to all subsequent federal statutes absent a specific exemption by Congress. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."). The ACA, enacted in 2010, did not contain a specific exemption and is subject to RFRA. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir. 2013).

Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014), in which closely-held for-profit corporations challenged the Mandate under RFRA. The difference between *Hobby Lobby* and this case is significant and frames the issue here. In *Hobby Lobby*, the plaintiff for-profit corporations objected on religious grounds to providing contraceptive coverage and could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties. *Id.* at 2759-60. In the cases before us, the plaintiff religious non- profit organizations can avail themselves of an accommodation that allows them to opt out of providing contraceptive coverage without penalty. Plaintiffs contend the process to opt out substantially burdens their religious exercise.

In other words, unlike in *Hobby Lobby*, the Plaintiffs do not challenge the general obligation under the ACA to provide contraceptive coverage. They instead challenge the process they must follow to get out of complying with that obligation. The Plaintiffs do not claim the Departments have not tried to accommodate their religious concerns. They claim the Departments' attempt is inadequate because the acts required to opt out of the Mandate substantially burden their religious exercise. As we discuss more fully below, however, the accommodation relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise.

III. BACKGROUND

We begin by providing background information on the ACA and its implementing regulations, the

Plaintiffs objecting to the accommodation scheme, and the procedural history of the three cases before us.

A. Regulatory Background

The regulations at issue in these cases have evolved in significant ways since their initial promulgation. We review: (1) the exemption from the ACA's contraceptive coverage requirement for churches and integrated auxiliaries, (2) the accommodation scheme for religious non-profit organizations, and (3) the mechanics of the accommodation scheme for different types of group health plans.

1. The ACA Mandate and the Religious Employer Exemption

Under the ACA, employer-sponsored group health plans must meet minimum coverage requirements. As part of these requirements, both group health plans and health insurance issuers must cover preventive health care services and cannot require plan participants and beneficiaries to share the costs of these services through co-payments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13. On July 19, 2010, the Departments issued interim final rules implementing the ACA's requirements for preventive services. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).

Among the services required by the ACA are preventive care and screenings for women "as provided for in comprehensive guidelines supported

by the Health Resources and Services Administration" ("HRSA"), a federal agency within HHS. 42 U.S.C. § 300gg-13(a)(4). On August 1, 2011, after receiving recommendations from the Institute of Medicine ("IOM"), the HRSA issued its guidelines for women's preventive health services. The guidelines include coverage of "[a]ll Food and Drug Administration [("FDA")] approved contraceptives, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. HRSA, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines (last visited Mar. 25, 2015).

In accordance with the HRSA's guidelines, the Departments require coverage of the full range of FDA-approved contraceptive services. *See* 26 C.F.R. § 54.9815- 2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Not all employers, however, are required to comply with the Mandate.

First, employers with 50 or fewer employees are exempt from the Mandate because they are not required to offer insurance under the ACA. *See* 26 U.S.C. §§ 4980H(c)(2)(A), 4980D(d).

Second, "grandfathered" plans are exempt from the Mandate because the ACA allows individuals to temporarily maintain the health coverage they possessed before the ACA was enacted. *See* 42 U.S.C. § 18011.[5]

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[5] The exception for grandfathered plans is temporary and transitional. A health plan loses its grandfathered status—and

Third, and the most relevant here, is the exemption for religious employers. In response to concerns from religious organizations, the Departments amended the interim final regulations to give the HRSA authority to exempt group health plans established or maintained by religious employers. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011). The Departments defined a "religious employer" as one that: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." *Id.* The cited sections "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order." *Id.* The Departments noted the definition was intended "to reasonably balance the extension of any coverage of contraceptive services under the HRSA

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is subject to the Mandate—when it eliminates benefits, increases cost sharing requirements, or changes the terms of employer contributions. *See* 45 C.F.R. § 147.140(g). In 2011, 56 percent of individuals who receive health care from their employer were covered by grandfathered plans; in 2014, only 26 percent were covered by grandfathered plans. *See* Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2014 Annual Survey*, 7 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report.

Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions." *Id.*[6] They invited comments on the proposed definition of "religious employer" and potential alternatives. *Id.*

The Departments received more than 200,000 responses to their request for comments from a variety of entities both supporting and opposing expansion of the proposed exemption. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). After reviewing these comments, they published final regulations on February 15, 2012, adopting their proposed definition of "religious employer." *Id.* at 8727. They also created a one-year safe harbor for religious non-profit organizations, during which the Departments would not enforce the Mandate against them. *Id.* at 8728.

2. The Accommodation Scheme for Religious Non-Profit Organizations

In response to religious groups that were dissatisfied with the scope of the proposed religious employer exemption, the Departments issued an advance notice of proposed rulemaking ("ANPRM") in anticipation of creating additional accommodations

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[6] A number of states have laws that require employers to cover contraceptive services but excuse some religious employers from complying. The Departments developed their definition to accord with these existing state laws. *See* 76 Fed. Reg. at 46,623.

for non-exempt religious non-profit organizations. Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). After reviewing the comments received from the ANPRM, the Departments published proposed rules creating an accommodation for a wider range of religious non-profit organizations. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 8456 (Feb. 6, 2013).

The Departments received over 400,000 comments on the proposed rules, and finalized two notable changes. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013). First, the Departments simplified and clarified the existing exemption for religious employers by eliminating the first three elements of the definition, thereby defining "religious employer" as "an employer that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code ["IRC"]." *Id.* at 39,874. Second, they created an accommodation for religious non-profit organizations that did not meet this simplified definition of a religious employer. *Id.*

The regulations state a religious non-profit organization can receive this accommodation if it: (1) has religious objections to "providing coverage for some or all of the contraceptive services required to be covered" under the Mandate, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) "self-certifies that it satisfies the first three criteria." *Id.* The accommodation is available for both (1) insured group health plans, under which an employer contracts with

a health insurance issuer to assume the risk of providing benefits to employees, and (2) self-insured group health plans, under which the employer itself assumes the risk of providing benefits to employees. *Id.* at 39,875-80.[7] As we explain below, religious non-profit organizations can self-certify their religious objection and receive the accommodation either by notifying their health insurance issuer or TPA or by notifying HHS directly.

a. EBSA Form 700

To self-certify under the accommodation scheme, the Departments initially required religious non-profit organizations to use the Employee Benefits Security Administration's ("EBSA") Form 700 ("Form").[8] Objecting organizations are relieved from complying with the Mandate by delivering the executed Form to their health insurance issuer or TPA. The Form notifies the health insurance issuer or TPA that the organization self-certifies as exempt from the Mandate because it has a religious objection to providing coverage for some or all contraceptive services to its employees, and identifies the relevant federal regulations under which the organization is permitted to opt out of that obligation. *See* Dep't of Labor, EBSA Form 700 (Aug. 2014), http://www.dol.gov/ebsa/preventiveserviceseligibleorg

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[7] Employers with self-insured group health plans typically employ a TPA to coordinate logistics and deliver benefits. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals*, 6 (Dec. 2008), http://www.cbo.gov/sites/default/files/12-18-keyissues.pdf.

[8] A copy of the Form appears at the end of this opinion.

anizationcertificationform.doc (citing 26 C.F.R. § 54.9815-2713A(a); 29 C.F.R. § 2590.715-2713A(a); 45 C.F.R. § 147.131(b)).

The back of the Form notifies TPAs of their obligations.[9] Form at 2. It informs the TPA that the eligible organization "[w]ill not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services." Form at 2. It identifies regulations requiring the TPA to provide contraceptive coverage without cost sharing to plan participants and beneficiaries if the TPA agrees to continue providing administrative services for a group health plan. *Id.* (citing 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A). A TPA that receives the Form from an objecting employer is eligible for a government payment to cover the costs of providing contraceptive coverage. *See* 45 C.F.R. § 156.50(d)(5).

As part of this scheme, the regulations initially included a non-interference provision, which specified that objecting religious non-profit organizations "must not, directly or indirectly, seek to influence the third party administrator's decision" whether to provide coverage for contraceptives. 26 C.F.R. § 54.9815-2713A(b)(iii) (2013). When the Plaintiffs filed their suits, they sought a preliminary injunction relieving them from complying with this version of the accommodation scheme, arguing delivery of the Form

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[9] The notice of regulatory requirements on the back of the Form is specifically addressed to TPAs. *See* Form at 2. The legal obligations of health insurance issuers are evident from the text of the ACA itself. *See* 42 U.S.C. § 300gg-13.

to their health insurance issuer or TPA constituted a substantial burden on their religious exercise in violation of RFRA and the First Amendment.

b. Alternative notice

In response to litigation by Plaintiffs and others, the Departments have since expanded the accommodation scheme.[10] The Supreme Court granted injunctions pending appeal in two suits brought by religious non-profit organizations, including the Little Sisters, that objected to the accommodation scheme. *See Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S. Ct. 1022 (2014). In a third suit, the Court declined to recall or stay a circuit court mandate in favor of the Government, but granted an injunction to religious non-profit organizations pending final disposition of their petition for certiorari. *See Zubik v. Burwell*, Nos. 14A1065, 14-1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015). The injunctions allowed the organizations to notify HHS directly of their religious objection to the Mandate rather than sending the Form to their health insurance issuers or TPAs. In response to the injunction in *Wheaton College*, the Departments issued an interim final rule on August 27, 2014, creating an alternative accommodation for religious non-profit organizations. Coverage of Certain

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[10] As we explain in this section, the Departments did not expand the pool of actors who could claim an accommodation and obtain relief from the Mandate. They expanded the accommodation scheme by offering objecting organizations an alternative method of self-certification.

Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014).[11]

These regulations relieve a religious non-profit organization from complying with the Mandate if it notifies HHS in writing of its religious objection to the provision of some or all contraceptive services. *Id.* at 51,094. The notice may be sent by letter or email, and must contain (1) "the name of the eligible organization and the basis on which it qualifies for an accommodation," (2) "its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services," including any particular subset to which it objects; (3) the name and type of the group health plan; and (4) the name and contact information for any of the plan's TPAs and/or health

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[11] We discuss the procedural history of the cases before us below, but note that this alternative accommodation is akin to the accommodation granted by the Supreme Court in the cases mentioned above—*Little Sisters*, 134 S. Ct. 1022; *Wheaton College*, 134 S. Ct. 2806; and *Zubik*, 2015 WL 3947586:

> If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators.

Wheaton Coll., 134 S. Ct. at 2807.

insurance issuers. *Id.* at 51,094-95. According to the Departments, these requirements constitute "the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations." *Id.* at 51,095.

The revised regulations also repeal the non-interference provision by deleting language prohibiting organizations from interfering with or seeking to influence their TPA's decision to cover contraception. *Id.*[12]

We note again that the entirety of this accommodation scheme for religious non- profit organizations—using either the Form or the alternative notice to HHS—was not available to the for-profit corporate plaintiff in *Hobby Lobby*. Here, an accommodation is available to Plaintiffs. In the cases before us, we consider whether their taking advantage

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[12] The regulations explain the rationale for this change:

> The Departments interpret the July 2013 final regulations solely as prohibiting the use of bribery, threats, or other forms of economic coercion in an attempt to prevent a third party administrator from fulfilling its independent legal obligations to provide or arrange separate payments for contraceptive services. Because such conduct is generally unlawful and is prohibited under other state and federal laws, and to reduce unnecessary confusion, these interim final regulations delete the language prohibiting an eligible organization from interfering with or seeking to influence a third party administrator's decision or efforts to provide separate payments for contraceptive services.

79 Fed. Reg. at 51,095.

of that accommodation to opt out of the Mandate is itself a substantial burden on their religious exercise.

3. The Mechanics of the Accommodation for Insured Plans, Self-Insured Plans, and Self-Insured Church Plans

The Plaintiffs use different types of employer-sponsored group health plans, which the Departments treat differently within the accommodation scheme. By its own terms, the ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. 42 U.S.C. § 300gg-13 ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."); 26 C.F.R. § 54.9815- 2713(a)(1); 29 C.F.R. § 2590.715-2713(a)(1); 45 C.F.R. § 147.130(a)(1). Because the differences among these arrangements are relevant to our discussion of the merits of Plaintiffs' claims, we consider it helpful to explain how the Mandate and accommodation scheme affect insured plans, self-insured plans, and self-insured church plans.

a. *Insured plans*

When a religious non-profit organization offers its employees an insured plan, the statutory language not only requires the group health plan to cover contraception, but also obligates the plan's health

insurance issuer to ensure plan participants and beneficiaries receive contraceptive coverage. *See* 42 U.S.C. §§ 300gg-13; 300gg-22. Thus, even if a religious non-profit organization does not self-certify that it has an objection, its health insurance issuer is obligated to provide contraceptive coverage to plan participants and beneficiaries and charge the organization for the cost. *See Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 7 F. Supp. 3d 88, 95-96 & n.2 (D.D.C. 2013). The organization can free itself from complying with the Mandate and paying for that coverage, however, "if the eligible organization or group health plan provides either a copy of the self- certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services." 26 C.F.R. § 54.9815-2713AT(c)(1); 29 C.F.R. § 2590.715-2713A(c)(1); 45 C.F.R. § 147.131(c)(1). When an organization submits the Form expressing an objection to providing contraceptive coverage, "the issuer has sole responsibility for providing such coverage in accordance with § 147.130." 45 C.F.R. § 147.131(c)(1)(i); *see also* 26 C.F.R. § 54.9815-2713AT(c)(1)(i) (requiring coverage in accordance with § 54.9815-2713); 29 C.F.R. § 2590.715-2713A(c)(1)(i) (requiring coverage in accordance with § 2590.715-2713). Similarly, when an organization notifies HHS, the Department of Labor will send a separate notification to the organization's issuer informing it of that notice and describing its regulatory obligations. 45 C.F.R. § 147.131(c)(1)(ii); *see also* 26 C.F.R. § 54.9815- 2713AT(c)(1)(ii); 29 C.F.R. § 2590.715-2713A(c)(1)(ii).

In the context of insured plans, health insurance issuers are generally responsible for paying for

contraceptive coverage when a religious non-profit organization opts out. *See* 45 C.F.R. § 156.50. The Departments expect this will be cost-neutral for issuers because of the cost savings that accompany improvements in women's health and lower pregnancy rates. *See* 78 Fed. Reg. at 39,877.

b. Self-insured plans

When a religious non-profit organization offers its employees a self-insured plan, the accommodation works in a slightly different fashion. A self-insured group health plan complies with the regulatory requirements and is excused from providing contraceptive coverage if "[t]he eligible organization or its plan contracts with one or more third party administrators" and "[t]he eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services." 26 C.F.R. § 54.9815- 2713AT(b)(1); 29 C.F.R. § 2590.715-2713A(b)(1).

Although the text of the ACA does not specify a role for TPAs, it expressly requires group health plans to include contraceptive coverage, and federal regulations impose obligations on TPAs that administer self-insured group health plans. *See* 42 U.S.C. § 300gg-13; 26 C.F.R. § 54.9815-2713AT(b); 29 C.F.R. § 2590.715-2713A(b). The regulations require a TPA administering a group health plan to provide or arrange for contraceptive coverage without cost sharing with the organization or its beneficiaries when it: (1) receives a notification that an eligible

employer has opted out of providing coverage and (2) decides to remain in a relationship with that employer or its plan to provide administrative services for the plan. 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The TPA's obligations are enforceable under the Employee Retirement Income Security Act ("ERISA"). *See* 78 Fed. Reg. at 39,879-80.

In the context of self-insured plans, a TPA may seek reimbursement if it has received the Form or a notification from the government and "provides or arranges payments for contraceptive services." *See* 26 C.F.R. § 54.9815-2713AT(b)(3); 29 C.F.R. § 2590.715-2713A(b)(3); 45 C.F.R. § 156.50(d)(2)(ii)-(iii). TPAs do so by working through health insurance issuers, who receive adjustments to fees they pay to the government under the ACA and pass along the reimbursements to TPAs. *See* 45 C.F.R. § 156.50(d).

c. Self-insured church plans

Although federal regulations impose certain requirements on TPAs, the Departments concede they lack authority to enforce those requirements as to self-insured "church plans," which are group health plans established by a church or association of churches covering the church's or association's employees. 29 U.S.C. § 1002(33). Organizations that provide health care coverage for employees through self-insured church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Unless a church plan has made an election under 26 U.S.C. § 410(d), which opts plans into provisions of ERISA, the Departments concede they lack authority to compel church plan TPAs to provide contraceptive coverage, and may not levy fines against those TPAs for failing to provide it.

d. Legal obligation to provide coverage after the accommodation

Although the accommodation is available for both insured and self-insured group health plans, the source of the legal obligation to provide contraceptive coverage after a religious non-profit organization has opted out differs based on the type of insurance arrangement the organization uses. When an organization takes advantage of the accommodation, the ACA requires health insurance issuers to provide coverage for insured group health plans, while federal regulations adopted pursuant to the ACA require TPAs to arrange coverage for self-insured group plans that are subject to ERISA. As we discuss below, these distinctions shape the claims advanced by different Plaintiffs in the cases before us.

B. The Plaintiffs

The Plaintiffs[13] in this litigation object to both means to receive an accommodation—sending the Form to their health insurance issuer or TPA or sending a notification to HHS. The Plaintiffs differ from each other in ways that are relevant to the Departments' authority to require employers to provide contraceptive coverage and relieve objecting religious non-profit organizations from the Mandate when they use the accommodation scheme.

1. *Little Sisters of the Poor*

The Little Sisters of the Poor Home for the Aged,

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[13] When we refer to the plaintiffs in all three cases collectively, we use "Plaintiffs." When we refer to a subset of the plaintiffs, we use "plaintiffs."

Denver, Colorado and Little Sisters of the Poor, Baltimore ("Little Sisters") belong to an order of Catholic nuns who devote their lives to care for the elderly. The Little Sisters provide health insurance coverage to their employees through the Christian Brothers Employee Benefit Trust ("Trust"), a self-insured church plan that is not subject to ERISA. The Trust uses Christian Brothers Services ("Christian Brothers"), another Catholic organization, as its TPA.

The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral. The Little Sisters "believe that it is wrong for them to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services." LS Br. at 10. They cite "well-established Catholic teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion." LS Br. at 9-10. The Little Sisters contend they "cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme," as the mere appearance of condoning these services "would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public." LS Br. at 10.

The Little Sisters are subject to the Mandate unless they take advantage of the accommodation scheme by delivering the Form to the Christian Brothers, their TPA, or notifying HHS of their religious objection. If they do not take one of these

steps and do not provide contraceptive coverage, they estimate a single Little Sisters home could incur penalties of up to $2.5 million per year, and allege the Trust could lose up to $130 million in plan contributions. The *Little Sisters* plaintiffs object that the accommodation scheme violates their sincerely held religious beliefs because they cannot take actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme.

2. *Southern Nazarene*

Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University are "Christ-centered institutions of higher learning." SN Br. at 1-2. Southern Nazarene is partially self-insured; it generally assumes the risks of providing coverage but contracts with a health insurance issuer to pay all claims over $100,000. For its insured employee coverage, it uses Blue Cross Blue Shield of Oklahoma. It offers separate coverage to students through an insured plan. Oklahoma Baptist is an insured university. It uses Blue Cross Blue Shield of Oklahoma, and offers separate coverage to students through an insured plan. Oklahoma Wesleyan is an insured university. It uses Community Care of Oklahoma. Mid-America Christian is a self-insured university on a church plan that is not subject to ERISA. It uses plans provided by GuideStone Financial Resources.[14]

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[14] The descriptions of Mid-America Christian's insurance arrangements in the record before us are inconsistent. Before the

The universities have brought suit collectively, but they are in slightly different positions insofar as Mid-America Christian University uses a church plan and contracts with a TPA, Oklahoma Baptist University and Oklahoma Wesleyan use health insurance issuers, and Southern Nazarene contracts with a TPA but uses a health insurance issuer for student coverage and employee claims above $100,000.

The universities believe "it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to abortion, abortion-inducing drugs and devices, and related counseling." SN Br. at 1-2. They object to the provision of contraceptives they consider abortifacients. The universities currently offer health plans to students

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district court, counsel described Mid- America Christian's plan as "insured by GuideStone," App. in SN at A32, and suggested it would be obligated, like Oklahoma Baptist and Oklahoma Wesleyan, to deliver the Form to its health insurance issuer to opt out of the Mandate. In its opening brief on appeal, counsel described Mid-America Christian's plan as "self-insured," and suggested it would be obligated, like Southern Nazarene, to deliver the Form to its TPA. SN Br. at 2, 18. In a supplemental brief and at oral argument, counsel now indicates Mid-America Christian has a self-insured church plan and is more akin to the *Reaching Souls* plaintiffs. SN Supp. Br. II at 9 n.2; Oral Arg. in SN at 20:24-20:32.

We treat Mid-America Christian's plan as a self-insured church plan. The parties in *Southern Nazarene* stipulated as fact that Mid-America Christian's group health plan is provided by GuideStone Financial Resources. *Southern Nazarene*, 2013 WL 6804265, at *2. Because we understand GuideStone Financial Resources to be a sponsor of self- insured church plans and not an insurer, we assume the latest characterization on appeal is correct and treat Mid-America Christian's group health plan as a self-insured church plan that is not subject to ERISA.

and employees that do not cover the contraceptives the universities find objectionable.

The universities are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections to relieve themselves of the obligation to provide contraceptive coverage. They object to the accommodation, however, because they believe it requires them to expressly or functionally offer contraceptive coverage through their group health plan, interferes with the spiritual development of their communities, and requires them to facilitate behavior they consider sinful. If they do not take advantage of the accommodation, each university must either provide coverage or incur penalties of $100 per employee per day.

3. ***Reaching Souls***

Reaching Souls is a non-profit corporation founded by a Southern Baptist minister and based in Oklahoma. The organization trains pastors and evangelists and provides care to orphans in Africa, India, and Cuba. Truett-McConnell College is a private liberal arts college based in Georgia. Both Reaching Souls and Truett-McConnell use the GuideStone Plan, a self-insured church plan that is not subject to ERISA. GuideStone Financial Resources, a Texas non-profit corporation, established the GuideStone Plan and holds the assets funding it in trust. GuideStone Financial Resources has entered into agreements with other entities to provide claims administration as TPAs under the GuideStone Plan, including Connecticut General Life Insurance Company, Highmark Health Services, and Express

Scripts, Inc.

Reaching Souls believes life begins at conception and objects to four of the twenty FDA-approved methods of contraception that Reaching Souls characterizes as abortifacients. Truett-McConnell has adopted the Southern Baptist Convention's statement of faith and objects to the same four methods of contraception. GuideStone Financial Resources, as an arm of the Southern Baptist Convention, also opposes coverage of contraception methods it believes to be abortifacients. The organizations ground their beliefs in the sanctity of human life and opposition to elective abortion in the religious teachings of the Southern Baptist Convention.

Both Reaching Souls and Truett-McConnell College are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections. If they do, GuideStone Financial Resources would have to pass the information to the TPAs of the GuideStone Plan to effectuate the coverage. The plaintiffs believe this would violate their religious beliefs "by making them complicit in the government's scheme to provide abortifacients." RS Br. at 4. If the organizations do not take advantage of the accommodation scheme or provide coverage, they contend they will incu millions of dollars in fines, which "would crush the ministries and force a mass exodus from GuideStone." RS Br. at 3.

C. Procedural History

The district courts reached different results in the three cases before us, denying a preliminary

injunction to the plaintiffs in *Little Sisters* but granting a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*. Reviewing the reasoning behind their determinations clarifies the claims before us on appeal.

1. *Little Sisters of the Poor*

In *Little Sisters*, the district court determined that complying with the accommodation scheme would not impose a substantial burden on the Little Sisters' or Christian Brothers' religious exercise. 6 F. Supp. 3d at 1239-45. The court's analysis of the preliminary injunction factors began and ended by examining whether the plaintiffs would suffer irreparable injury if the requested relief were denied. *Id.* at 1236. After determining it was the court's duty to determine how the regulations operate as a matter of law, *id.* at 1239, the court concluded the accommodation scheme does not require the Little Sisters to provide contraceptive coverage or to participate in the provision of contraceptive coverage, *id.* at 1239-42.

The court noted that the Little Sisters—unlike the plaintiffs in *Hobby Lobby*— could be relieved of the obligation to provide coverage by signing and delivering the Form to their TPA, the Christian Brothers. *Id.* at 1237.[15] The court underscored that,

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[15] At the time the district courts decided all three of the cases before us, the interim final rules allowing Plaintiffs to opt out by notifying HHS of their religious objection had not yet been issued. The district court decisions therefore focus on the Form and do not consider the expanded accommodation scheme in August 2014's interim final rules. In supplemental briefing to this court, the Plaintiffs argue the expanded scheme does not adequately address the religious liberty concerns they have

while the Departments could require the Little Sisters to sign and deliver the Form to their TPA to avoid the Mandate, the Departments lacked enforcement authority under ERISA to levy fines or otherwise force the Christian Brothers to provide contraceptive coverage as the TPA for a self-insured, ERISA-exempt church plan. *Id.* at 1243-44. The court concluded that requiring the Little Sisters to sign and deliver the Form to opt out did not constitute a substantial burden on their religious exercise and declined to issue a preliminary injunction. *Id.* at 1242-45.

The Little Sisters next asked the Tenth Circuit for an injunction pending appeal, which this court denied. The Supreme Court subsequently granted their request for an injunction pending appeal, allowing the Little Sisters to notify HHS of their religious objection instead of sending the Form to their TPA as the regulations at the time required. *See Little Sisters*, 134 S. Ct. 1022. The Little Sisters now appeal the district court's denial of a preliminary injunction.

2. *Southern Nazarene*

In *Southern Nazarene*, the district court granted a preliminary injunction to the plaintiffs. 2013 WL 6804265, at *11. The court's analysis focused mainly on the plaintiffs' likelihood of success on the merits.[16]

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raised in this litigation.

[16]The district court noted that, unlike in the recently decided *Priests for Life*, 7 F. Supp. 3d 88, the parties in *Southern Nazarene* "stipulated that the *act of signing the certification* is contrary to the religious beliefs to which these institutions subscribe." *Southern Nazarene*, 2013 WL 6804265, at *8. The court's characterization paraphrases the stipulation, which

Id. at *7-10. The court characterized the Form as "in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *Id.* at *8. It determined the Form imposed a substantial burden on the plaintiffs' sincere religious exercise and the Government had not articulated a compelling state interest or argued its approach was the least restrictive means of advancing that interest. *Id.* at *7-10.

The court concluded the plaintiffs had shown they were likely to succeed on the merits. *Id.* After reaching this conclusion, it briefly reviewed the other preliminary injunction factors and entered a preliminary injunction that prevented the Departments from enforcing the Mandate, requiring self-certification to opt out, or levying penalties. *Id.* at *10-11. The Government now appeals the district court's ruling.

3. *Reaching Souls*

Like the district court in *Southern Nazarene*, the district court in *Reaching Souls* granted a preliminary

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addresses only the litigation position taken by the *Southern Nazarene* plaintiffs. The parties specifically stipulated: "The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs." *Id.* at *5. The Government accepts that the *Southern Nazarene* plaintiffs take the position that completing the self-certification would violate their religious beliefs—a fairly straightforward characterization of their litigation position—but has never conceded that completing the self-certification actually would violate their religious beliefs.

injunction to the plaintiffs. 2013 WL 6804259, at *8. The court primarily analyzed the likelihood of plaintiffs' success on the merits. *Id.* at *6-8. It characterized the Government's substantial burden argument as "simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*," likening it to the argument that the Mandate was not a substantial burden on for-profit employers because it required intervening acts by third parties—employees deciding whether to acquire contraception. *Id.* at *7. It emphasized that regardless of whether the Form actually triggers the provision of contraceptive services, the plaintiffs believe that signing it would signal their tacit support or cooperation. *Id.*

The court thus determined "the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate." *Id.* at *8. It briefly reviewed the other preliminary injunction factors and enjoined the Government from requiring the plaintiffs to comply with the Mandate and accommodation scheme or penalizing the plaintiffs for noncompliance. *Id.* The Government now appeals the district court's ruling.

IV. UNUSUAL NATURE OF PLAINTIFFS' CLAIM

Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a

generally applicable law.

Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc), *aff'd sub nom. Hobby Lobby*, 134 S. Ct. 2751, the ACA required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010), a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).

The Supreme Court's recent ruling in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim. The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. 135 S. Ct. at 861. The Court ultimately approved this compromise in its ruling. *Id.* at 867.

In the cases before us, by contrast, the Departments have developed a religious accommodation rather than leaving it for the courts to fashion judicial relief. Plaintiffs not only challenge a law that requires them to provide contraceptive coverage against their religious beliefs, they challenge the exception that the law affords to them. The precedents Plaintiffs cite are instructive in some respects, but none of them involve a situation where the government offers religious objectors an accommodation.[17] The Supreme Court and this circuit have suggested such accommodations might have eliminated or lessened burdens we otherwise deemed substantial. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2759 (observing the accommodation scheme "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty"); *Yellowbear*, 741 F.3d at 56 (underscoring that the case "isn't a situation where the claimant is left with some degree of choice in the matter and we have to inquire

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[17] The accommodation adds an additional consideration that makes this unlike the typical RFRA case. In *Hobby Lobby*, *Yellowbear*, *Abdulhaseeb*, and *Holt*, the government either required or prohibited acts of religious significance to the plaintiffs. In the cases before us, the government has freed Plaintiffs from the responsibility to perform the act they consider religiously objectionable—namely, providing contraceptive coverage. Nonetheless, the Plaintiffs argue an act they do not consider objectionable in itself—completing a form or writing to HHS—becomes objectionable because it either causes the provision of contraceptive coverage or renders them complicit in the provision of contraceptive coverage. Therefore, unlike the aforementioned cases, we are in the slightly different position of considering whether an otherwise unobjectionable act, understood in context, constitutes a substantial burden on Plaintiffs' religious exercise.

into the degree of the government's coercive influence on that choice"). Until now, however, we have not squarely considered a RFRA challenge to a religious accommodation.

The closest Tenth Circuit case we have found is *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), in which defendant Winslow Friday argued his conviction for shooting a bald eagle without a permit violated RFRA because he shot the eagle for use in a tribal religious ceremony. The Bald and Golden Eagle Protection Act forbids killing a bald eagle, but an applicant can obtain a permit to "take" a live eagle for a religious ceremony. *See* 16 U.S.C. §§ 668, 668a. We recognized the potential question of "whether it substantially burdens Mr. Friday's religion to require him to obtain a permit in advance of taking an eagle." *Friday*, 525 F.3d at 947. We said we were "skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA," *id.*, but Mr. Friday did not make that specific argument, and we decided the permit accommodation otherwise met RFRA's strict scrutiny element, *id.* at 948.

We spoke favorably of the government's accommodation scheme in *Friday*, even though "[t]hat accommodation may be more burdensome than the [religious objectors] would prefer, and may sometimes subordinate their interests to other policies not of their choosing." *Id.* at 960. As we noted in conclusion: "Law accommodates religion; it cannot wholly exempt religion from the reach of the law." *Id.* We therefore turn to uncharted Tenth Circuit terrain.

* * * *

The Plaintiffs in the three cases before us assert claims against the Mandate and accommodation scheme under RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses.[18] Because we determine the accommodation scheme relieves Plaintiffs from complying with the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights, we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters* and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*.

V. RFRA

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

Plaintiffs argue the ACA and its implementing regulations violate RFRA because they substantially burden their religious exercise by forcing them to do one of three things: (a) comply with the Mandate and provide contraceptive coverage, (b) take advantage of the accommodation scheme, or (c) pay steep fines for

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[18] We refer to "Plaintiffs" throughout the discussion, but in the First Amendment context, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls*. *See infra* note 51.

non-compliance.[19] We conclude that the accommodation scheme relieves Plaintiffs of complying with the Mandate or paying fines and does not impose a substantial burden on Plaintiffs' religious exercise for the purposes of RFRA.

To explain why the accommodation is permissible under RFRA, we first review the RFRA framework and consider how religious accommodations may lessen or eliminate the substantiality of a burden on

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[19] The Government identifies a fourth option: by declining to sponsor a group health plan, Plaintiffs could avoid complying with the Mandate, using the accommodation, or paying the fines. The Government frames the Plaintiffs' provision of health insurance as an economic expenditure, and notes that regulations may make a business activity more expensive or onerous without violating the freedom of religion.

See Tony & Susan Alamo Found. v. Sec. of Labor, 471 U.S. 290, 303-05 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 605-06 (1961); *but see Hobby Lobby*, 134 S. Ct. at 2777. Plaintiffs respond that they consider the provision of health insurance a religious obligation, not merely an economic expenditure. Plaintiffs "believe they have a religious obligation to care for the employees who join in their ministry, and they cannot throw those people off their insurance policies without violating that obligation and harming their ministry." LS Reply Br. at 8.

Because we determine the accommodation scheme is not a substantial burden, we need not decide whether this fourth option constitutes a substantial burden on religious exercise—or, if it does, whether it survives strict scrutiny.

For similar reasons, we need not address the safe harbor provision detailed in the June 2013 regulations, which indicates organizations with self-insured group health plans that bring administration of their plans in-house and thereby do not use third-party administrators currently are not subject to enforcement of the contraceptive coverage requirement. 78 Fed. Reg. at 39,880-81.

religious exercise. We then apply this framework to the accommodation scheme before us, which exempts religious non-profits from providing contraceptive coverage and instead assigns that task to health insurance issuers and TPAs.

We conclude the accommodation does not substantially burden Plaintiffs' religious exercise. The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

The dissent parts ways with our majority opinion on the self-insured plaintiffs' RFRA claims. It stresses that, by opting out, the self-insured plaintiffs would cause the legal responsibility to provide contraceptive coverage to shift to their TPAs.[20] We agree. As we observe below, the regulations are clear on that

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[20] Plaintiffs make causation the centerpiece of their RFRA claim. They allege that opting out of the Mandate would cause or make them complicit in providing contraceptive coverage, and thus substantially burdens their religious exercise. Much of our opinion assesses and ultimately rejects the merits of this claim.

point.[21] But shifting legal responsibility to provide coverage away from the plaintiffs relieves rather than burdens their religious exercise. The ACA and its implementing regulations entitle plan participants and beneficiaries to coverage whether or not the plaintiffs opt out. And the government has established a scheme where, if the law is followed, self-insured plaintiffs that opt out are relieved of providing, paying for, and facilitating coverage; the government assigns that responsibility to their TPAs; and plan participants and beneficiaries receive the coverage to which they are entitled by federal law. Such an arrangement is among the common and permissible methods of religious accommodation in a pluralist society, and does not constitute a substantial burden under RFRA.

A. Legal Background

1. Standard of Review

Each appeal before us seeks review of a district court order granting or denying a preliminary injunction. We review orders granting or denying a preliminary injunction for abuse of discretion. *See Hobby Lobby*, 723 F.3d at 1128; *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006).

A preliminary injunction may be granted if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant

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[21] Indeed, this is an unremarkable feature of the accommodation scheme. An opt out religious accommodation typically contemplates that a non-objector will replace the religious objector and take over any legal responsibilities.

outweighs any harm to the non-moving party; and (4) an injunction is in the public interest." *Hobby Lobby*, 723 F.3d at 1128. A district court abuses its discretion by granting or denying a preliminary injunction based on an error of law. *See id.*; *Aid for Women*, 441 F.3d at 1115.

2. RFRA and Free Exercise

RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court held that burdens on religious exercise are constitutional under the Free Exercise Clause if they result from a neutral law of general application and have a rational basis. *Id.* at 878-80; *United States v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002). Congress enacted RFRA to restore the pre-*Smith* standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. *Smith*, 494 U.S. at 882-84; *see also Hobby Lobby*, 134 S. Ct. at 2792-93 (Ginsburg, J., dissenting). Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b)(1).

By restoring the pre-*Smith* compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise jurisprudence. *See id.*; *Hobby Lobby*, 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*. There is no

indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence . . . ."). Notably, pre-*Smith* jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy*,

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

476 U.S. 693, 707 (1986). As we discuss at greater length below, the pre-*Smith* standards restored by RFRA permitted the Government to impose *de minimis* administrative burdens on religious actors without running afoul of religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th

Cir. 2001); *see* 42 U.S.C. § 2000bb-1(a).[22] The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means available." *Hobby Lobby*, 723 F.3d at 1142-43. The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 1126 (quotations and citation omitted). "This burden-shifting approach applies even at the preliminary injunction stage." *Id.*

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief." *Hobby Lobby*, 723 F.3d at 1125-26 (quotations and alterations omitted); *see also Yellowbear*, 741 F.3d at 55 (applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at 1315 (same). As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for

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[22] RFRA originally defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." In 1999, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amended RFRA, and redefined "exercise of religion" by reference to 42 U.S.C. § 2000cc-5(7)(A). 42 U.S.C. § 2000bb-2(4). Section 2000cc-5(7)(A) expanded the phrase to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); *see Kikumura*, 242 F.3d at 960.

courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner . . . correctly perceived the commands of [his or her] faith." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see Hobby Lobby*, 723 F.3d at 1138-40. But courts do determine whether a challenged law or policy substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.

RFRA states the federal government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). We must "give effect . . . to every clause and word" of a statute when possible. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch).

We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning.

See Menasche, 348 U.S. at 538-39. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Every circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the government has imposed a "substantial burden" is a legal determination. *See E. Tex. Baptist Univ. v. Burwell*, Nos. 14-20112, 14-10241, 14-40212, 14-10661, 2015 WL 3852811, at *3-5 & n.33 (5th Cir. June 22, 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir. 2015); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir. 2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247-49 (D.C. Cir. 2014); *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir. 2014), *vacated and remanded*, 135 S. Ct. 1914 (2015). This is consistent with our determination that we review *de novo* "what constitutes [a] substantial burden . . . and the ultimate determination as to whether the RFRA has been violated." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir. 1996); *see also Yellowbear*, 741 F.3d at 56 (determining "a reasonable finder of fact could conclude the prison has substantially burdened Mr. Yellowbear's religious exercise"). Thus, we "accept[] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008); *see Mahoney v. Doe*,

642 F.3d at 1112, 1121 (D.C. Cir. 2011); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001).[23]

We have cautioned that substantiality does not permit us to scrutinize the "theological merit" of a plaintiff's religious beliefs—instead, we analyze "the intensity of the coercion applied by the government to act contrary to those beliefs." *Hobby Lobby*, 723 F.3d at 1137 (emphasis omitted). "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Id.*[24] In determining whether a law or policy applies substantial pressure on a claimant to violate his or her beliefs, we consider how the law or policy being challenged actually operates and affects

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[23] Plaintiffs cite *Thomas* to argue we must accept their belief that they cannot participate in the accommodation whether or not that belief is "acceptable, logical, consistent, or comprehensible." LS Br. at 47; RS Br. at 39 (quoting *Thomas*, 450 U.S. at 714). *Thomas* concerned the denial of unemployment benefits to a claimant who quit his job because his religious beliefs prohibited him from producing armaments to be used for war. *Thomas* prevents courts from scrutinizing the theological merit of a plaintiff's sincere religious belief, but not from assessing whether a challenged law or policy amounts to a substantial burden on religious exercise. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." (citing *Thomas*, 450 U.S. at 716)).

[24] The Government does not dispute the sincerity of Plaintiffs' religious beliefs. *See Little Sisters*, 6 F. Supp. 3d at 1237; *Southern Nazarene*, 2013 WL 6804265, at *5; *Reaching Souls*, 2013 WL 6804259, at *4.

religious exercise. *See Geneva Coll.*, 778 F.3d at 436 ("We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the appellees' exercise of religion—all without delving into the appellees' beliefs."); *see also* 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (observing that RFRA would not impose strict scrutiny for "governmental actions that have an incidental effect on religious institutions").

When evaluating RFRA claims, we have therefore recognized that not all burdens alleged by plaintiffs amount to substantial burdens. *See Abdulhaseeb*, 600 F.3d at 1321 ("We are not willing to conclude, however, that every single presentation of a meal an inmate considers impermissible constitutes a substantial burden on an inmate's religious exercise."); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 654 (10th Cir. 2006) ("[W]e are not persuaded by Grace United's assertion that the Board's denial of a zoning variance for its proposed daycare operation constitutes more than an incidental burden on religious conduct."); *Kikumura*, 242 F.3d at 961 (requiring evidentiary proof from the plaintiff that an alleged burden was "substantial" and remanding to the district court). Furthermore, as we discuss in the following section, the existence of an accommodation may affect whether a law or policy burdens religious exercise and whether that burden is substantial.

5. Accommodations Can Lessen or Eliminate Burden

We finally note that accommodations function to lessen or eliminate the burden of a generally applicable law. In *Hobby Lobby*, this court said the stark choice between providing contraceptive coverage and paying steep fines constitutes a sufficiently substantial burden to warrant relief under RFRA. *Hobby Lobby*, 723 F.3d 1114.

Religious objectors are not always put to such a stark choice. When, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA.

Accommodations may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes. The Supreme Court recognized this point in *Hobby Lobby* when it suggested an accommodation to exempt the plaintiff corporations from complying with the Mandate could satisfy RFRA concerns. *Hobby Lobby*, 134 S. Ct. at 2782 ("At a minimum, [the accommodation] does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."); *see also id.* at 2786-87 (Kennedy, J., concurring). The D.C. Circuit observed that "[a] burden does not rise to the level of being substantial when it places an inconsequential or *de*

minimis burden on an adherent's religious exercise." *Priests for Life*, 772 F.3d at 246 (quotations, citations, and alterations omitted). Were it otherwise, our substantial burden inquiry would become a blunt tool incapable of recognizing the meaningful difference between forcing organizations to provide or pay for contraceptives and allowing them to opt out of that requirement. To determine whether the accommodation scheme in these cases renders the alleged burden on Plaintiffs' religious exercise nonexistent or insubstantial, we turn to the merits of Plaintiffs' RFRA arguments.

B. Substantial Burden Analysis

1. Plaintiffs' RFRA Arguments

The cases before us turn on whether complying with the accommodation constitutes a substantial burden. The Government does not dispute the sincerity of Plaintiffs' religious belief that they may not provide, pay for, or facilitate contraceptive coverage. The parties dispute whether the accommodation scheme substantially burdens the Plaintiffs' exercise of religion.

Plaintiffs oppose completing the Form or notifying HHS because they believe they are being asked to play a causal role in the delivery of contraceptive coverage and would be complicit or perceived to be complicit in the overall contraceptive delivery scheme by virtue of their opting out. They also allege their continuing involvement in the regulatory scheme is a substantial burden.[25]

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[25] The *Little Sisters* and *Reaching Souls* plaintiffs clarify that

The Government responds that completing the Form or notification does not involve Plaintiffs in the delivery of contraceptive coverage. The accommodation relieves Plaintiffs of their obligations under the Mandate, and when that occurs, federal law authorizes and obligates a health insurance issuer or TPA to provide or arrange for the delivery of contraceptive coverage to plan participants and beneficiaries who are entitled to that coverage under

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they "have never objected to merely identifying themselves so that the government can leave them alone." LS Supp. Br. II at 2 n.2; RS Supp. Br. II at 2 n.2. They have expressed satisfaction with the Supreme Court's injunctions pending appeal in *Little Sisters* and *Wheaton College*. LS Supp. Br. II at 1-2; RS Supp. Br. II at 2, 12; Oral Arg. in LS at 12:10-12:40. They nevertheless object to the recent modified accommodation promulgated by the Departments—the opt out letter to HHS—both because the self-certification requires more information about their group health plan than the aforementioned notice the Supreme Court proposed, and because of the "collateral consequences" that follow after they opt out. Oral Arg. in LS at 12:10-13:53.

The *Little Sisters* and *Reaching Souls* plaintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not. In *Wheaton College*, the Supreme Court emphasized the plaintiffs had functionally notified the Departments they met the necessary requirements to obtain an accommodation, and said "[n]othing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." 134 S. Ct. at 2807; *see also Zubik*, 2015 WL 3947586.

The *Southern Nazarene* plaintiffs object to affirmatively voicing a religious objection, including the type of notice described in *Wheaton College*. *See* Oral Arg. in SN at 24:30-25:20. They appear to believe that exemption from the Mandate—like the exemption for religious employers—is the only proper result under RFRA.

the ACA. The Government therefore argues the accommodation does not substantially burden Plaintiffs' religious exercise as a matter of law.

2. The Accommodation Scheme Eliminates Burdens on Religious Exercise

Under the accommodation scheme, the act of opting out relieves objecting religious non-profit organizations from complying with the Mandate and excuses them from participating in the provision of contraceptive coverage. The Departments designed the accommodation so that, upon receipt of the Form or a notification from the government, health insurance issuers and TPAs—not the objecting religious non-profit organization—provide contraceptive coverage and ensure the organization will not be required to provide, pay for, or otherwise facilitate that coverage. *See Mich. Catholic Conf.*, 755 F.3d at 391. We review this feature of the accommodation scheme to show how it eliminates burdens Plaintiffs otherwise would face, similar to the burdens the for-profit plaintiffs faced in *Hobby Lobby*.

First, the regulations specify a health insurance issuer must handle contraceptive coverage separately from the insurance provided under the religious non-profit organization's plan.

> A group health insurance issuer that receives a copy of the self-certification or notification . . . must (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and (B) Provide separate payments for any contraceptive services required to be

> covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

45 C.F.R. § 147.131(c)(2)(i).[26]

Second, after a religious non-profit organization opts out, a health insurance issuer may not share the costs of providing contraception with the employer or employees.

> With respect to payments for contraceptive services, the [health insurance] issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.

45 C.F.R. § 147.131(c)(2)(ii); *see also* 26 C.F.R. § 54.9815-2713A(c)(2)(ii); 29 C.F.R. § 2590.715-2713A(c)(2)(ii). TPAs are subject to similar requirements. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

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[26] TPAs are not subject to this provision. Instead, a TPA that receives the Form or a notification from the government must provide or arrange for contraceptive coverage for plan participants and beneficiaries if it wishes to remain the TPA for the group health plan. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

Finally, a health insurance issuer or TPA must, in communicating with plan participants or beneficiaries, send separate notice regarding contraceptive coverage from other plan notifications and make clear the employer neither administers nor funds contraceptive benefits. A health insurance issuer or TPA

> must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re- enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

26 C.F.R. § 54.9815-2713A(d); 29 C.F.R. § 2590.715-2713A(d); *see also* 45 C.F.R. § 147.131(d).

All of the foregoing remove the objecting religious non-profit organizations from providing contraceptive coverage, but Plaintiffs argue these protections of their religious liberty are insufficient because they still must deliver a Form or notify HHS to opt out of the Mandate. They contend this act substantially burdens their religious exercise because it "triggers" the provision of contraceptive coverage, makes them

complicit in the larger delivery scheme, and demands their ongoing involvement. We disagree. The accommodation relieves Plaintiffs of their statutory obligation to provide contraceptive coverage to their plan participants and beneficiaries, and as we discuss below, taking advantage of that accommodation is not a substantial burden on religious exercise.

3. The Accommodation Scheme Does Not Impose a Substantial Burden

To explain why the accommodation scheme does not substantially burden Plaintiffs' religious exercise; we look at the theories argued by the Plaintiffs and why they fail.

a. Opting out does not cause contraceptive coverage.

Although the accommodation scheme frees Plaintiffs from providing, paying for, or facilitating contraceptive coverage, they contend that, by delivering the Form or notifying HHS, they nevertheless "trigger" or cause contraceptive coverage. They do not. As we explain below, Plaintiffs' causation argument misconstrues the statutory and regulatory framework. Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries. Because the mechanics of the accommodation scheme differ slightly for different types of plans, we examine how the regulations work for insured plans, self-insured plans, and self-insured church plans. But in each circumstance, Plaintiffs' causation argument fails to establish any burden on Plaintiffs' religious exercise.

i. Insured Plans

The plaintiffs with insured plans deal directly with a health insurance issuer and do not use a TPA.[27] They argue the accommodation scheme levies a substantial burden on their religious exercise because "insurance issuers will sell [them] plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon [their] execution and conveyance of the self- certification to the issuer." SN Br. at 18. We disagree.

The regulations do not burden the religious exercise of employers using insured plans. The ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. A religious non-profit organization may comply with the Mandate and provide coverage to its employees, opt out using the accommodation, or not comply with the law and pay fines. But in each instance, the health insurance issuer must ensure the organization's employees receive contraceptive coverage.

By delivering the Form or notifying HHS, an organization with an insured plan does not enable coverage—to the contrary, it simply notifies its health insurance issuer the organization will not be providing coverage. The health insurance issuer then has an independent and exclusive obligation to provide that coverage without cost sharing. The

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[27] The plaintiffs with insured plans are Oklahoma Wesleyan University and Oklahoma Baptist University. Southern Nazarene also has an insured plan for students and claims above $100,000.

relevant regulation states: "When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130." 45 C.F.R. § 147.131(c)(1)(i). Because the ACA obligates health insurance issuers to provide contraceptive coverage, they must meet this obligation independently and irrespective of the notification. The self-certification does not impose any responsibility; it merely makes it the issuer's *sole* responsibility rather than one shared with the group health plan itself.

Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise. The insured plaintiffs are not burdened when they are relieved of their responsibility and their insurers provide coverage as required by independent obligations set out in the ACA.

ii. Self-Insured Plans

The accommodation scheme permits religious non-profit organizations with self- insured plans to opt out by delivering the Form to their TPA or notifying HHS that they have a religious objection and will not comply with the Mandate. When the objecting organization opts out, the TPA that administers its group health plan is responsible for providing contraceptive coverage if it wishes to remain a TPA for the plan. In this section, we address this self-insured arrangement. In the next section, we consider the subset of self-insured plaintiffs having church plans over which the government lacks enforcement

authority under ERISA to compel the TPA to comply with its legal obligations.

1) Plaintiffs' argument

The only plaintiff with a self-insured plan subject to ERISA is Southern Nazarene. Southern Nazarene argues the accommodation scheme substantially burdens its religious exercise because the scheme requires it to "comply with the Mandate by either (a) setting up a self-insured plan that includes abortifacients; or (b) setting up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them by the TPA upon the entity's execution of the self-certification." SN Br. at 18. Self-insured plaintiffs with ERISA-exempt church plans make similar claims.

Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out.[28] We consider this to be an uncontested and unremarkable feature of the

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[28] In *University of Notre Dame*, Judge Posner said: "By refusing to fill out the form Notre Dame would subject itself to penalties, but Aetna and Meritain would still be required to provide the services to the university's students and employees." *Univ. of Notre Dame*, 786 F.3d at 614.

We understand the mechanics of the accommodation to work differently. Aetna, as a health insurance issuer for Notre Dame's students, would be obligated to provide contraceptive coverage under the ACA whether or not Notre Dame delivered the Form or notification to HHS. *See* 42 U.S.C. § 300gg-13. Meritain, a TPA, would be obligated to provide contraceptive coverage only after Notre Dame delivered the Form or notification to HHS and opted out of the Mandate. *See* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2).

accommodation scheme.[29] The regulations state that when a religious non-profit organization opts out of providing contraceptive coverage, the TPA is notified that the organization will not administer or pay for contraceptive coverage, and that it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. 26 C.F.R. § 54.9815- 2713AT(b)(2); 29 C.F.R. § 2590.715-2713A(b)(2). The TPA is authorized and obligated to provide the coverage guaranteed by the ACA only if the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it.

Plaintiffs suggest this shift in legal responsibility for contraceptive coverage substantially burdens their religious exercise under RFRA. They argue their opting out would trigger, cause, or offer a "permission slip" for the delivery of contraception by allowing their TPA to provide the coverage. *Southern Nazarene*, 2013 WL 6804265, at *8. We disagree.

2) Opting out does not cause coverage

The ACA requires all group health plans to cover preventive services, including contraception, without cost sharing. Because a group health plan must include contraceptive coverage under the ACA, the

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[29] Even the dissent in *Wheaton College* recognized that a TPA need only provide the legally required contraceptive coverage when a religious non-profit organization takes advantage of the accommodation scheme. As Justice Sotomayor observed, "a third-party administrator bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." *Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting from grant of injunction pending appeal).

accommodation scheme requires a TPA that administers a self-insured religious non-profit organization's group health plan to provide coverage if the organization opts out. The TPA must then arrange coverage for plan participants and beneficiaries if it wishes to continue functioning as the TPA for the objecting organization. This arrangement allows religious non-profit organizations to opt out and ensures plan participants and beneficiaries will receive the contraceptive coverage to which they are entitled by law.

Under this framework, the plaintiffs' argument does not identify a substantial burden on religious exercise. The opt out does not "cause" contraceptive coverage; it relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor. The ACA and its implementing regulations have already required that group health plans will include contraceptive coverage and have assigned legal responsibilities to ensure such coverage will be provided when the religious non-profit organization opts out. *See Wheaton College v. Burwell*, No. 14-2396, 2015 WL 3988356, at *4 (7th Cir. July 1, 2015); *E. Tex. Baptist Univ.*, 2015 WL 3852811, at *5-6; *Univ. of Notre Dame*, 786 F.3d at 613-14; *Geneva Coll.*, 778 F.3d at 437-38; *Priests for Life*, 772 F.3d at 254-55.[30] This arrangement is typical

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[30] To the extent Plaintiffs are specifically concerned about the language on the Form, that concern can be alleviated by taking advantage of the expanded accommodation and notifying HHS in writing. Plaintiffs need not use any terms they consider morally charged, like "certify," in their letter or email to HHS.

We further note the notification to HHS requires self-insured

of religious objection accommodations that shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds.[31] Although a religious non- profit

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plaintiffs only to register their objection and identify their TPA—it does not require them to inform their TPA of any legal responsibilities to provide contraceptive coverage. When the opt out is submitted to HHS, the plaintiffs are relieved of their responsibilities. The government then takes steps to ensure that coverage is provided—HHS notifies the Department of Labor of the objection, and the Department of Labor then contacts the TPA to inform it of its duties under the ACA.

[31] Analogizing the opt out to conscientious objections to war, *see, e.g.*, *Priests for Life*, 772 F.3d at 245-46; *Univ. of Notre Dame*, 786 F.3d at 623-24 (Hamilton, J., concurring), should not overshadow the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors. Many religious objection schemes require an affirmative opt out before another person is required to step in and assume responsibility, and may require the objector to identify a replacement in the process. *See, e.g.*, 2015 Utah Laws Ch. 46 (accommodating religious objections to same- sex marriage of those working in county clerks' offices by requiring that "[a] county clerk shall . . . establish policies to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued"); *Stormans Inc. v. Selecky*, 844 F. Supp. 2d 1172 (W.D. Wash. Feb. 22, 2012) (reinstating a "refuse and refer" approach where pharmacies need not provide contraception so long as they refer patients to alternative providers); Conn. Agencies Regs. § 19a-580d-9 (requiring health care providers who object to implementing a do-not-resuscitate order to "turn over care of the patient without delay to another provider who will implement the DNR order"); Internal Revenue Service, Tax Guide for Churches & Religious Organizations 18 (2013), www.irs.gov/pub/irs-pdf/p1828.pdf (explaining that a church may opt out of paying Social Security and Medicare taxes for religious reasons, shifting that responsibility to their

organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.[32] In short, the framework established by federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will receive contraceptive coverage.[33]

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employees to pay those taxes as though they were self-employed).

[32] Plaintiffs argue that, under the accommodation scheme, organizations with self- insured plans participate in the delivery of contraceptive coverage because their TPAs cannot arrange for that coverage unless and until plaintiffs deliver the Form or notification to HHS. We discuss above why this characterization of the accommodation scheme is incorrect, but we note here that this concern is specific to self-insured plans subject to ERISA. Plaintiffs could avoid the situation they deem objectionable by employing an insured plan, employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or administering the self-insured plan on their own in-house without using a TPA. Although the dissent notes that in- house administration is complex, Dissent at 22-23, Plaintiffs have not demonstrated it would be a substantial burden under RFRA. The fact that this alternative may be more expensive or difficult for plaintiffs does not necessarily make it a substantial burden. *See Braunfeld*, 366 U.S. at 605-06.

[33] In this regard, the accommodation scheme here is comparable to a conscientious objector accommodation scheme, which provides for someone to replace the objector when he opts out of military service. *See Priests for Life*, 772 F.3d at 245-46; *see also Univ. of Notre Dame*, 786 F.3d at 623-24 (Hamilton, J., concurring). Indeed, the conscientious objector scheme is administratively more burdensome than filing the Form or notifying HHS to opt out of the Mandate. A conscientious objector must register in the Selective Service System before being able to apply for an exemption, must complete an application and appear for an in-person interview, and, if the

exemption is granted, must perform two years of service for the government in lieu of military service. *See* 50 U.S.C. § 456j.

The dissent points to differences between the religious accommodation here and the conscientious objector scheme. But the comparison is apt. Courts have recognized that, to opt out of military service for religious reasons, a conscientious objector must notify the government of his objection knowing that someone else will take his place. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 96 n.13 (1977) (Marshall, J., dissenting) (recognizing that "the effect of excusing conscientious objectors from military conscription is to require a nonobjector to serve instead, yet we have repeatedly upheld this exemption"); *Sheridan v. United States*, 483 F.2d 169, 174 (8th Cir. 1973) (acknowledging that when the plaintiff evaded induction, "another person had to be called in his place"); *McKenzie v. Schuppener*, 415 F.2d 1056, 1058 (5th Cir. 1969) (characterizing a conscientious objection application as "the situation where appellant must go to Vietnam or someone else go in his place"). Similarly, to opt out of the Mandate, the self-insured religious objector must notify the government knowing that a TPA will take its place.

And historically, it is not unprecedented to require an objector to identify a substitute for military service. To the contrary, the first federal draft statute permitted a draftee to avoid service only by either providing a substitute or paying $300. *See* Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863). As the dissent observes, the Civil War Enrollment Act sparked riots, Dissent at 14-15 n.7, but these were triggered by opposition to the draft itself, the inability of working class people to pay the $300 exemption, and anxiety about freed slaves entering the labor market after the war—not the fact that the draft law allowed draftees to name a substitute in their place. *See* Leslie M. Harris, In the Shadow of Slavery: African Americans in New York City, 1626-1863, at 279-88 (2003). Although Congress later eliminated the $300 commutation fee (except for conscientious objectors), it retained the provision allowing enrollees to supply a substitute. *See* Act of July 4, 1864, ch. 237, §§ 2, 10, 11, 13 Stat. 379, 379-80 (1864). To the extent the dissent suggests Chief Justice Taney's thoughts on the topic are relevant, Dissent at

3) Response to dissent

The dissent argues that our reasoning fails to appreciate the difference between insured and self-insured plans. With insured plans, the health insurance issuer bears legal responsibility to provide contraceptive coverage whether or not the religious non-profit has opted out. With self-insured plans, the TPA shoulders legal responsibility for coverage only after the religious non-profit has opted out.

We agree this is a distinction between these types of plans, but the dissent overplays its importance. *See* Dissent at 5 (deeming the difference between insured and self-insured plans "the critical distinction").[34] In both contexts, the ACA requires that group health plans cover contraceptive services, and a plaintiff knows coverage will be provided when it opts out. Plaintiffs do not dispute plan participants and beneficiaries' right to contraceptive coverage, nor do they contest the government's ability to require TPAs

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14-15 n.7, we note that he considered conscription itself unconstitutional, not the substitution provision. *See* Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1546-48 (1969). In fact, Chief Justice Taney paid $100 to excuse his "body servant" from the draft. *See* Bernard C. Steiner, Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court 511-12 (1922).

[34] Although the Mandate in the insured plan context assigns responsibility to provide contraceptive coverage to both the religious non-profit organization and its health insurance issuer, we do not believe this is the only permissible arrangement to permit religious accommodation. Requiring all accommodations to follow this model would be duplicative, costly, and impractical, and would foreclose a wide range of pragmatic arrangements that bring in substitutes when and only when a religious objector opts out of performing a task. *See, e.g.*, *supra* note 31.

and health insurance issuers to arrange for such coverage when a religious non- profit organization opts out. The only question before us is whether the plaintiffs are substantially burdened when they notify the government of their objection with the knowledge that another party will be required to provide coverage in their stead. The answer is no.

A religious accommodation tries to reconcile religious liberty with the rule of law. When faced with an unavoidable conflict between following the law or religious belief, RFRA provides a religious objector a means to challenge a generally applicable law and seek an exception to avoid following that law without having to break it. A statutory accommodation, as we have here, serves the same purpose. As noted above, this case is unusual because the Plaintiffs do not seek an accommodation where none exists, but instead challenge a statutory accommodation and argue that the process for seeking refuge in it substantially burdens their religious exercise. As to the self-insured plaintiffs, the dissent contends that if they opt out and transfer their duty to provide contraceptive coverage to the TPA, they necessarily cause such coverage. We disagree.

By opting out, the self-insured plaintiffs shift their duty to provide coverage to a TPA, but they do not change their plan participants and beneficiaries' entitlement to contraceptive coverage under federal law.[35] The dissent suggests, however, that because the

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[35] The dissent attempts to distinguish between health plan beneficiaries' entitlement to coverage and their actual receipt of coverage. This distinction breaks down under inspection. If a religious non-profit complies with the law by providing coverage,

plaintiffs can stymie coverage to their employees by breaking the law and incurring fines, and because opting out ultimately results in the TPAs' providing coverage, the plaintiffs' opting out therefore would cause contraceptive coverage. But this misconstrues the purpose of religious accommodation: to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation.

In making this argument, the dissent focuses almost exclusively on whether the plaintiffs' opt out is a but-for cause of the TPAs' authority to provide contraceptive coverage.[36] It does, but this approach

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the beneficiaries are entitled to and receive coverage. If the non-profit opts out as the law allows, the beneficiaries likewise are entitled to and receive coverage, they just do not receive it from the non-profit. Only if the non-profit disobeys the law and refuses either to provide coverage or opt out would the beneficiaries not receive coverage (though they would still be entitled to it). If the opt out were not part of the law, the plaintiffs would be in the same position as the for-profits in *Hobby Lobby*—without a legal option to avoid providing coverage. But the accommodation scheme gives the plaintiffs a legal avenue to avoid providing coverage as opposed to non-compliance with the law with the attendant financial penalties.

[36] Plaintiffs and the dissent characterize the self-certification as giving the TPA "permission" to provide contraceptive coverage. Dissent at 9. This characterization ignores that the self-certification specifically registers an objection to providing coverage, relieves the plaintiffs of their obligation to provide it, and affirmatively distances the plaintiffs in numerous ways from providing coverage to plan participants and beneficiaries. *See*

misses the mark. Although opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage, that is the point of an accommodation—shifting a responsibility from an objector to a non-objector. That is how a legislative policy choice—here, to afford women contraceptive coverage—can be reconciled with religious objections to that policy. We do not "den[y] the existence of any causation." Dissent at 10. We instead correctly identify the effect of opting out. The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable. The effect is not the provision of contraceptive coverage, which would be afforded under the law whether or not the plaintiff opts out.

The ACA requires that either the religious non-profit organization or the TPA must provide contraceptive coverage for a self-insured group health plan, and the accommodation must be evaluated with that provision in mind. The scheme allows the religious non-profit organization to opt out of the responsibility of providing coverage and assigns that duty to the TPA administering the group health plan. Crucially, it does not change or expand contraceptive coverage beyond what federal law has already guaranteed. As the Supreme Court said in *Hobby*

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supra Section V.B.2. Equating the opt out to a permission slip is akin to "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting).

The government is not compelling the plaintiffs to endorse or license something they consider objectionable; instead, the government is allowing them to decline a legal responsibility while requiring another party to perform it in their stead.

Lobby, the effect of the accommodation on employees "would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2760.

The government has designed the accommodation so plaintiffs that opt out are freed from providing, paying for, or facilitating contraception, and the TPA's responsibility to provide coverage in their stead stems from federal law. Because this arrangement does not substantially burden the plaintiffs when they comply with the law, it does not matter whether the plaintiffs could prevent plan participants and beneficiaries from receiving coverage by violating the law. The dissent seems to suggest the ACA and its implementing regulations give self-insured plaintiffs discretion to decide whether their employees receive contraceptive coverage. The ACA and its implementing regulations do not, and the plaintiffs do not contend that they do. To the contrary, federal law generally requires that all people must have health insurance and that all health insurance must include preventive services, including contraceptive coverage. *See* 42 U.S.C. § 300gg-13.[37] And "although [the ACA] does not specifically mention third-party administrators, they administer 'group health plans,' which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation." *E. Tex. Baptist Univ.*,

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[37] The dissent asks, "if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries?" Dissent at 8. The answer is the self-insured plaintiffs, if they comply with the law. But this is the reason for the opt out: to allow the plaintiffs a legal means to avoid providing coverage.

2015 WL 3852811, at *5 (alterations omitted). The accommodation scheme does not give plaintiffs discretion to thwart their employees' right to contraceptive coverage by refusing to provide coverage and also refusing to register their objection so the government can make alternative arrangements to free them from providing coverage.[38] Because Congress has created a federal entitlement to contraceptive coverage and formulated a framework to guarantee that coverage will be provided even if plaintiffs decline to provide it, self-insured plaintiffs do not "cause" contraceptive coverage by exercising their ability to opt out.

4) No cause of substantial burden

In sum, the self-insured plaintiffs' causal analysis falters regarding the effect of opting out, which is to shift legal responsibility to provide contraceptive coverage from plaintiffs to their TPAs. When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, plaintiffs are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met.

To establish a claim under RFRA, about which the dissent says little, a plaintiff must show the government substantially burdens its sincere religious exercise. The ACA states group health plans

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[38] In the absence of any such discretionary power or responsibility, plaintiffs are not faced with the Hobson's choice the dissent describes. Dissent at 7-8, 12, 23. To the contrary, the accommodation eliminates any Hobson's choice by allowing plaintiffs to opt out of providing coverage.

must cover contraception, and the regulations state that if a religious non-profit organization opts out, that coverage will be provided by a TPA. Opting out does not cause the coverage itself; federal law does, by establishing a scheme that permits plaintiffs to opt out of their legal responsibility while simultaneously ensuring that plan participants and beneficiaries receive the coverage to which they are legally entitled. Allowing plaintiffs to opt out is not a substantial burden under RFRA.[39]

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[39] The dissent's theory of causation is not viable for the reasons discussed above. We also fail to see how it comports with the Supreme Court's orders in *Wheaton College*, 134 S. Ct. 2806, and *Zubik*, 2015 WL 3947586. In Part II.B.1, the dissent objects that "a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out." Dissent at 9. But that would be equally true of the arrangement proposed in the Supreme Court's orders in *Zubik*, which enjoined the Mandate only "[i]f the applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR §54.9815-2713A(a) or 29 CFR §2590.715-2713A(a) or 45 CFR §147.131(b) (as applicable)," 2015 WL 3947586, at *1, and *Wheaton College*, which enjoined the Mandate only "[i]f the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services," 134 S. Ct. at 2807. (The plaintiffs in *Zubik* are self-insured and use TPAs. *See Geneva College*, 778 F.3d at 433. Wheaton College employs various insurance arrangements, but uses a TPA to deliver a portion of its coverage—specifically, its prescription drug coverage. *See Wheaton College v. Burwell*, 50 F. Supp. 3d. 939, 944 (N.D. Ill. 2014).) Wheaton College had already submitted a notice of its objection to the government, but the Supreme Court did not limit the injunction to that factual scenario. As Justice Sotomayor observed, "because Wheaton is materially indistinguishable from other nonprofits that object to

iii. Self-Insured Church Plans

The foregoing analysis of self-insured plans applies to the subset of self-insured church plans. We address additional reasons here to reject the church plan plaintiffs' RFRA claims.

The plaintiffs with self-insured church plans are in a unique position.[40] A TPA cannot be compelled to provide or arrange for contraceptive coverage if it administers a church plan under 26 U.S.C. § 414(e) that has not elected to comply with provisions of ERISA under 26 U.S.C. § 410(d)—which describes the self-insured church plans in the cases before us. The Departments concede they lack authority under ERISA to force these church plan TPAs to perform their regulatory responsibility. *See* 29 U.S.C. § 1003(b)(2). As a result, the Government can require the plaintiffs with self-insured church plans to use the Form or notify HHS to register their objection and opt out, but it has no enforcement authority to compel or penalize those plaintiffs' TPAs if they decline to provide or arrange for contraceptive coverage.[41]

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the Government's accommodation, the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy." *Wheaton College*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

[40] The plaintiffs with self-insured church plans include the Little Sisters, Reaching Souls, Truett-McConnell, and Mid-America Christian. The analysis in this section also applies to the plaintiffs that operate or administer self-insured church plans, which include the Christian Brothers Employee Benefit Trust, Christian Brothers Services, and GuideStone Financial Resources.

[41] If TPAs for self-insured church plans decide not to provide

The lack of enforcement authority makes any burden on plaintiffs with church plans even less substantial than the burden on plaintiffs with self-insured plans that are subject to ERISA. Nonetheless, plaintiffs with church plans offer the following arguments as to why the accommodation scheme might still burden their religious exercise. First, the Departments could decide to alter the regulations and assert authority over church plans under ERISA. Second, the mere act of signing the Form or delivering the notification may involve them in the provision of contraception, either by cooperating with the Departments or by providing authorization to a TPA, which then decides it wants to provide contraceptive coverage after all. Third, their opting out incentivizes TPAs to provide coverage even if they are exempt from ERISA. Fourth, the Government has not demonstrated why the plaintiffs must complete the self-certification if their TPAs can decline to provide contraceptive coverage. In addition to the reasons self-insured plans in general are not substantially

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contraceptive coverage, plan participants and beneficiaries would not get the coverage to which they are otherwise entitled under the ACA. The dissent suggests it is paradoxical to maintain the ACA ensures plan participants and beneficiaries will receive contraceptive coverage and also acknowledge TPAs for self-insured church plans may in fact decline to provide that coverage. Dissent at 11 n.4. The positions are consistent. The ACA requires all group health plans to provide contraceptive coverage, but because it can only enforce that requirement through ERISA, church plans that are exempt from ERISA do not face any consequences if they fail to meet it. Put differently, the ACA creates a legal duty for *all* group health plans, but the Government cannot enforce that duty against a narrow subset of self-insured church plans. The inability to enforce that duty does not mean the duty does not exist.

burdened by the accommodation scheme, we conclude the plaintiffs with self-insured church plans have failed to identify a substantial burden on religious exercise.

1) Hypothetical regulation

The plaintiffs argue the Departments could assert authority over church plans under ERISA at some point in the future. We assess the regulations as they currently exist, not amendments to ERISA's implementing regulations the Department of Labor may hypothetically promulgate. An "[i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). Should the Departments assert ERISA authority over church plans at some later date, plaintiffs may then seek a preliminary injunction to prevent the Departments from enforcing the Mandate. Unless and until the Departments change their position, however, plaintiffs' speculative argument does not warrant a preliminary injunction. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011).

2) No causation from church plan TPA notification

The plaintiffs contend completing the self-certification would be a substantial burden because it would allow TPAs to provide coverage to their group health plan participants and beneficiaries, even if the Departments cannot compel the TPA to do so under ERISA. But plaintiffs with self-insured church plans

are not substantially burdened by the requirement that they complete the Form or notification to HHS. As we explained in the previous section on self-insured plans, when a religious non-profit organization opts out of the Mandate, the requirement that the group health plan include contraceptive coverage is a product of federal law, not the product of the organization's opting out. Opting out frees plaintiffs from their obligation to provide contraceptive coverage under the ACA. The lack of substantial burden is especially evident when the group health plan is administered by a TPA that has made clear it will not provide contraceptive coverage on religious grounds. The Little Sisters' TPA, for example, is Christian Brothers, their co-plaintiff in this case. It is clear Christian Brothers need not, and will not, provide contraceptive coverage if the Little Sisters opt out of the Mandate.[42]

3) No incentive from church plan TPA notification

Even when TPAs for self-insured church plans indicate they may comply with the Mandate, the TPAs make that decision, and the objecting religious non-profit organization is not substantially burdened. The plaintiffs in *Reaching Souls* argue one of their TPAs, Highmark, has indicated it will provide contraceptive coverage if they opt out of the Mandate. The *Reaching Souls* plaintiffs argue their act of opting out would not only provide Highmark with permission to provide

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[42] Plaintiff TPAs that administer church plans are not substantially burdened for similar reasons. In the absence of any enforcement power, the Government cannot levy fines against them for declining to provide contraceptive coverage.

contraceptive coverage, but would incentivize it to do so because Highmark could then seek reimbursement from the government.

Plaintiffs fail to demonstrate the reimbursement provision actually gives TPAs an incentive to provide coverage. They claim a TPA that receives the Form or a letter from the government "becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead." LS Br. at 16. At a hearing in *Reaching Souls*, counsel for the Government seemed to accept this characterization. But the regulations themselves expressly contradict this reading. They state the payment for margin and overhead goes to health insurance issuers who act as intermediaries for the reimbursement, and need not go to TPAs.[43] *See* 45 C.F.R. § 156.50(d)(5) (specifying health insurance issuers must reimburse TPAs for "the portion of the adjustment attributable to the total dollar amount of the payments for contraceptive services submitted by the third party administrator" but that "[n]o such payment is required with respect to the allowance for

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[43] The Departments credit the health insurance issuer for (1) the total dollar amount of the TPA's payments for contraceptive coverage, and (2) an allowance of at least 10% for administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(3). The health insurance issuer then pays the TPA for the total dollar amount of the TPA's payments for contraceptive coverage, but is not required to pay the TPA the allowance for administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(5). As a result, the regulations require only that a TPA receive repayment for what it has actually spent providing contraceptive coverage. A reimbursement solely for costs incurred would not generate a profit or offer any incentive to provide contraceptive coverage.

administrative costs and margin").

Moreover, even if TPAs were to receive a payment for margin and overhead—set at 15% of costs for 2014—plaintiffs do not demonstrate this allowance actually functions as an incentive to provide contraceptive coverage rather than repayment for the administrative costs TPAs incur by stepping in to arrange for or provide coverage. Plaintiffs have not demonstrated the allowance for administrative overhead actually generates a profit for TPAs, nor have they demonstrated that the allowance would incentivize TPAs to provide coverage where they otherwise would not.

4) The Government may require affirmative objection

Plaintiffs finally argue that if the Departments lack ERISA enforcement authority against TPAs of self-insured church plans, the Government has no reason to require religious non-profit organizations to comply with the accommodation scheme and deliver the Form or notify HHS. It is the plaintiffs' burden, however, to state a prima facie case under RFRA. Because they cannot establish that signing the Form or notifying HHS constitutes a substantial burden on their religious exercise, we do not question the Departments' interest in requiring them to opt out of the Mandate to avoid penalties for failure to provide contraceptive coverage.[44]

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[44] The Departments have a sound reason to require an affirmative opt out—not all religious organizations share the beliefs of the Little Sisters, Reaching Souls, Truett- McConnell, and Mid-America Christian. The parties agree that the

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We conclude the Plaintiffs' causation arguments do not establish a burden on their religious exercise, much less a substantial burden, because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage.[45] We therefore turn to Plaintiffs' argument that the act of opting out and the administrative requirements associated with the accommodation make them feel or appear complicit in the overall contraceptive coverage scheme.

e. No substantial burden from complicity

The accommodation relieves Plaintiffs from providing, paying for, or facilitating contraceptive coverage, and federal law requires health insurance issuers and TPAs to provide contraceptive coverage when religious non-profit organizations take advantage of the accommodation. Plaintiffs argue the act of opting out would nevertheless substantially burden their religious exercise because they believe delivering the Form or notification to HHS would make them complicit in the overall scheme to deliver contraceptive coverage. They wish to play no part in it. We find this argument unconvincing for a number

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Departments can require non-objecting employers to provide contraceptive coverage under their group health plans. To enforce that general requirement, the Departments may require objecting employers to affirmatively voice their objection instead of assuming all religious non-profit organizations share the plaintiffs' beliefs.

[45] Under these circumstances, as the Third Circuit observed, "the burden is not merely attenuated at the outset but totally disconnected from the appellees." *Geneva Coll.*, 778 F.3d at 442.

of reasons.

First, the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit—that they do not have to provide, pay for, or facilitate contraception. Plaintiffs' concern that others may believe they condone the Mandate is unfounded. Opting out sends the unambiguous message that they *oppose* contraceptive coverage and refuse to provide it, and does not foreclose them from objecting both to contraception and the Mandate in the strongest possible terms.

Second, to the extent Plaintiffs assert that completing the Form or notification violates their religious beliefs, they state a necessary but not a sufficient predicate for a RFRA claim. Under RFRA, they must establish that completing the Form or notification substantially burdens their religious exercise; otherwise, this argument could be used to avoid almost any legal obligation that involves a form. Plaintiffs do not object to signing forms and paperwork generally—they object to the Form or notification to HHS, and they do so because they believe it involves them in directly or indirectly providing, paying for, or facilitating contraceptive coverage, which they oppose as a matter of religious conviction. As we have explained, the Plaintiffs misstate their role in the accommodation scheme. RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.[46]

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[46] Plaintiffs cite *Thomas* for the proposition that we cannot question the theological merit of their religious beliefs. *See*

Thomas, 450 U.S. at 715 ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). We agree with that proposition, but we may—indeed, we must— determine whether the accommodation scheme substantially burdens their religious exercise.

In *Thomas*, Mr. Thomas believed he could not participate in the production of war materials. *Id.* at 709. The government argued Mr. Thomas's beliefs did not warrant protection by suggesting those beliefs were inconsistent and not shared by his co-religionists. *Id.* at 714-15. The Supreme Court specifically rejected these attempts to impeach Mr. Thomas's religious beliefs, *id.* at 715-16, but the Court was not confronted with the question of whether those beliefs were substantially burdened. Both the Supreme Court and the Tenth Circuit have indicated that accepting a plaintiff's religious belief does not foreclose an inquiry into whether religious exercise has been substantially burdened. *See, e.g.*, *Hernandez*, 490 U.S. at 699; *Kikumura*, 242 F.3d at 961.

The Government does not question Plaintiffs' religious beliefs that contraception is sinful and they cannot be involved in providing, paying for, or facilitating contraceptive coverage. But Plaintiffs go beyond *Thomas* when they insist that we cannot question whether opting out makes them complicit in providing contraceptive coverage. We may properly consider that opting out excuses them from providing coverage, does not cause that coverage to be extended to plan participants and beneficiaries, and involves only routine administrative tasks that are not substantial burdens under RFRA. *See Little Sisters*, 6 F. Supp. 3d at 1239 ("Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations.").

For these reasons, *Thomas* is inapposite when the inquiry focuses on whether a burden is substantial. It does not preclude courts from examining the relationship between a sincerely held religious belief and the alleged burden imposed by the

Third, because the accommodation does not involve them in providing, paying for, facilitating, or causing contraceptive coverage, Plaintiffs' only involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves. All opt-out schemes require some affirmative act to free objectors from the obligations they would otherwise face. The Plaintiffs' logic would undermine conscientious objection schemes that require the objection to be made, relieve objectors of their obligations, but assign those obligations to other, non-objecting actors in their stead. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (acknowledging a petitioner must complete an exemption application to obtain conscientious objector status in wartime); *Welsh v. United States*, 398 U.S. 333 (1970) (same).[47]

Government. This important distinction prevents the Government from having to survive strict scrutiny whenever a plaintiff misunderstands the burden being placed upon them—for example, if Mr. Thomas had been required to produce equipment for farming and sincerely, but incorrectly, believed that equipment was being produced for war. *See, e.g.*, *Priests for Life*, 772 F.3d at 249 n.14.

[47] As other courts have observed, invalidating the accommodation scheme would run contrary to many other laws allowing objectors to opt out of government programs and requirements. *See Priests for Life*, 772 F.3d at 245 (deeming Plaintiffs' argument against the accommodation scheme "extraordinary and potentially far reaching"); *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 557 (7th Cir. 2014), *vacated and remanded sub nom.*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015) ("The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis. . . . What makes this case and others like it involving the contraception exemption

Having to file paperwork or otherwise register a religious objection, even if one disagrees with the ultimate aim of the law at issue, does not alone substantially burden religious exercise.

The Government may therefore require religious objectors to complete *de minimis* administrative tasks to opt out. Filing the Form or notifying HHS easily fits within this category. The Departments have made opting out of the Mandate at least as easy as obtaining a parade permit, filing a simple tax form, or registering to vote—in other words, a routine, brief administrative task. The purpose of the Form or notification to HHS is to extricate Plaintiffs from their legal obligation to provide contraceptive coverage. Opting out ensures they will play no part in the provision of contraceptive coverage, prohibits TPAs and health insurance issuers from sharing the costs of providing coverage with them, and requires notice to employees that they do not administer or fund contraceptive services.

The notification to HHS is especially minimal, as it requires Plaintiffs only to register their objection with HHS and does not require any contact with their health insurance issuers or TPAs. Although Plaintiffs must tell HHS which health insurance issuer or TPA they use to opt out of the Mandate, this is not a substantial burden on religious exercise.[48] It is the

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paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.").

[48] Plaintiffs using the Form need only enter the name of the

kind of administrative task the Departments can require of religious believers in the administration of governmental programs. *See Priests for Life*, 772 F.3d at 246; *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305-06 (1985); *see also Jimmy Swaggart Ministries v. Bd. of Equaliz. of Cal.*, 493 U.S. 378, 395 (1990); *Hernandez*, 490 U.S. at 696-97. When understood in light of the ACA's requirement that group health plans and health insurance issuers provide contraceptive coverage and the manner in which the accommodation relieves Plaintiffs of providing that coverage, identifying one's TPA in a letter to HHS is at most a minimal burden and certainly not a substantial one.

Finally, Plaintiffs are not substantially burdened

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objecting organization, name and title of the individual authorized to make the certification on behalf of the organization, and the mailing address, email address, and phone number of that individual. That person signs, dates, and sends the form to their TPA or health insurance issuer. Employers are required to keep the Form on file for six years. The Plaintiffs have leeway in drafting a notification to HHS, which need only include

> the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers.

79 Fed. Reg. at 51,094-95.

when, after they opt out and are relieved of their obligations under the Mandate, health insurance issuers or TPAs must provide contraception to plan participants and beneficiaries. Plaintiffs sincerely oppose contraception, but their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." *Priests for Life*, 772 F.3d at 246. Pre-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-54 (1988); *Bowen*, 476 U.S. at 699-700; *Tony & Susan Alamo Found.*, 471 U.S. at 303; S. Rep. No. 103-111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 ("[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."). RFRA does not prevent the Government from reassigning obligations after an objector opts out simply because the objector strongly opposes the ultimate goal of the generally applicable law.

Plaintiffs' complicity argument therefore fails. Opting out would eliminate their complicity with the Mandate and require only routine and minimal

administrative paperwork, and they are not substantially burdened by the Government's subsequent efforts to deliver contraceptive coverage in their stead.

f. No burden from ongoing requirements

As a final argument, Plaintiffs deny the act of opting out would free them from further involvement in the provision of contraceptive coverage. They argue the accommodation scheme would require their ongoing participation, and give two examples to support this claim.

First, Plaintiffs argue they would remain involved because the Departments are commandeering their group health plans to provide contraceptive coverage to their employees. They note their TPA or health insurance issuer can provide coverage only as long as plan participants and beneficiaries remain employed with the religious non-profit organization.

Plaintiffs have not shown, assuming they opt out, how the provision of coverage to plan participants and beneficiaries through the health insurance issuer or TPA would substantially burden their religious exercise. Plaintiffs' plan participants and beneficiaries are not guaranteed contraceptive coverage without cost sharing because they work for the Plaintiffs; they are guaranteed contraceptive coverage under the ACA. The ACA mandates health insurance that includes contraceptive coverage. *See* 42 U.S.C. § 300gg-13(a)(4). Plaintiffs' theory would not only relieve them of complying with the Mandate, it would prevent health insurance issuers and TPAs from stepping in under the ACA to provide plan

participants and beneficiaries with the coverage they are entitled to receive under federal law.

Second, Plaintiffs object that they must (a) notify their TPA or health insurance issuer when employees join or leave their broader health insurance scheme, and (b) complete the self-certification or notification to HHS when they create or terminate a relationship with a TPA or health insurance issuer. As to the first requirement, employers already must notify their TPA or health insurance issuer when they hire or fire employees. The communication with the TPA or health insurance issuer regarding general health insurance coverage for entering or exiting plan participants and beneficiaries would occur regardless of any legal obligation under the accommodation scheme. The latter requirement, however, is an obligation specific to the accommodation scheme. An insured or self-insured employer using the Form must send it to "each" TPA or health insurance issuer as the employer forms contractual relationships with them. 26 C.F.R. § 54.9815-2713AT(b)(1)(ii); 29 C.F.R. § 2590.715-2713A(b)(1)(ii). If the employer instead uses the notification process, the regulations state: "If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services." 26 C.F.R. § 54.9815-2713AT(b)(1)(ii)(B); 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B).

Once again, this does not constitute a substantial burden. The only new requirement is that employers must complete the Form or notify HHS of their objection when they contract with a new health insurance issuer or TPA. Plaintiffs do not argue the

time, cost, or energy required to comply with this requirement constitutes a substantial burden; they argue it is the moral significance of their involvement which burdens their religious exercise.[49] If the first self-certification is not a substantial burden, a second or third self-certification would not be substantially burdensome given the extremely minimal administrative requirements of the Form or notification. As we have discussed above, *de minimis* administrative requirements do not themselves amount to substantial burdens on religious liberty. *See Tony & Susan Alamo Found.*, 471 U.S. at 305-06; *see also Jimmy Swaggart Ministries*, 493 U.S. at 394-95; *Hernandez*, 490 U.S. at 696-97. If the actual delivery of the Form or notification is not a substantial burden, a contingent administrative requirement to update the Form or notification is not either.

The regulations require the Plaintiffs to complete the Form or deliver the notification if they wish to opt out. But this ministerial act to opt out is not a substantial burden on religious exercise, nor are the collateral requirements of the scheme. The Departments have allowed Plaintiffs to opt out of a neutral and generally applicable requirement imposed by federal law, and have done so in a manner that affirmatively distances those organizations from the provision of contraceptive coverage that other employers must provide. It is not a substantial burden to require organizations to provide minimal

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[49] The interim final rules estimate "the total annual burden for preparing and providing the information in the self-certification or notice to HHS will require approximately 50 minutes for each eligible organization with an equivalent cost burden of approximately $53." 79 Fed. Reg. at 51,097.

information for administrative purposes to take advantage of that accommodation.

C. Strict Scrutiny

Because we determine Plaintiffs have failed to demonstrate a substantial burden on their religious exercise, we need not address whether the Departments have shown a compelling state interest and adopted the least restrictive means of advancing that interest.[50]

D. Conclusion

In the absence of a substantial burden, Plaintiffs have not demonstrated a strong likelihood of success on the merits of their RFRA claim, nor have they demonstrated they will suffer irreparable injury if an injunction is denied. Accordingly, a preliminary injunction on RFRA grounds is inappropriate.

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[50] We recognize third-party rights and interests are at stake in this litigation— namely, that plan participants and beneficiaries are entitled by law to contraceptive coverage without cost sharing. When evaluating RFRA and Free Exercise claims, courts properly consider the impact of religious liberty claims on pre-existing rights holders. *Hobby Lobby*, 134 S. Ct. at 2760 (emphasizing "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *see Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985); *Yoder*, 406 U.S. at 230; *Sherbert*, 374 U.S. at 409; *Braunfeld*, 366 U.S. at 604-05. Because we determine Plaintiffs have not demonstrated a substantial burden on their religious exercise, we do not reach the strict scrutiny analysis where the rights and interests of third parties are properly weighed.

VI. FIRST AMENDMENT

Although the district courts focused almost exclusively on RFRA, Plaintiffs also raised constitutional claims. They argue the accommodation scheme violates the Free Exercise and Establishment Clauses of the First Amendment by exempting religious employers from the Mandate but requiring religious non-profit organizations to seek an accommodation.[51] Plaintiffs also argue the

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[51] In this discussion of First Amendment claims, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls*, and not *Southern Nazarene*. All of the plaintiffs raised First Amendment claims in their complaints, but only the *Little Sisters* and *Reaching Souls* plaintiffs preserved these claims in their subsequent motions for a preliminary injunction and briefs on appeal. App. in LS at 57a-66a, 136a-38a; App. in RS at A65-74, A145-49.

The district courts in *Little Sisters* and *Reaching Souls* did not reach the First Amendment claims. In *Little Sisters*, the court found the plaintiffs' assertion of irreparable harm—which they were required to show to obtain a preliminary injunction, *see Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)—was based only on RFRA. *See Little Sisters*, 6 F. Supp. 3d at 1245. In *Reaching Souls*, the court determined it did not need to reach First Amendment claims because it granted a preliminary injunction on RFRA grounds. *See Reaching Souls*, 2013 WL 6804259, at *8 n.9.

On appeal, we consider the First Amendment claims in both cases. First, the *Little Sisters* plaintiffs made a sufficient argument before the district court. They expressly sought a preliminary injunction on First Amendment as well as RFRA grounds. App. in LS at 136a-138a. They did not elaborate on their First Amendment claims in the irreparable harm analysis, but "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Kikumura*, 242 F.3d at 963 (quotations omitted). Second,

accommodation scheme simultaneously compels and silences their speech in violation of the Free Speech Clause of the First Amendment. We disagree and conclude the accommodation scheme comports with the First Amendment. We note that the same standard of review we identified for the RFRA claim applies to the First Amendment claims.

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although we reverse the district court's grant of a preliminary injunction on RFRA grounds in *Reaching Souls*, plaintiffs there raised the question whether that preliminary injunction is appropriate on First Amendment grounds. "If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed." *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009); *see also Hobby Lobby*, 723 F.3d at1145 ("The record we have is the record the parties chose to create below—it is the record they deemed sufficient for the district court to decide the preliminary injunction question. For each element, we believe this record suffices for us to resolve each of the remaining preliminary injunction factors."). Because the First Amendment claims in both *Little Sisters* and *Reaching Souls* are legal questions that have been fully briefed on appeal, we resolve those questions in this opinion rather than remanding them to the district courts and prolonging this litigation.

By contrast, the *Southern Nazarene* plaintiffs included First Amendment claims in their complaint, but did not assert them in their motion for a preliminary injunction or accompanying memorandum of law. As a result, the district court did not reach any First Amendment claims in its decision. *See Southern Nazarene*, 2013 WL 6804265. Moreover, the *Southern Nazarene* plaintiffs do not make First Amendment claims in their opening brief on appeal.

Although we believe our First Amendment analysis applies to all group health plans and does not depend on whether they are insured, self-insured, or self-insured church plans, we note *Little Sisters* and *Reaching Souls* involve only self-insured church plans that are not subject to ERISA, and the insured and self-insured plans discussed in *Southern Nazarene* are not before us.

A. Free Exercise Clause

Plaintiffs contend the ACA and its implementing regulations violate the Free Exercise Clause by exempting some religious objectors—churches and their "integrated auxiliaries"—from the Mandate, while requiring others—specifically, religious non-profit organizations—to comply with the Mandate, seek an accommodation, or pay substantial fines. They have not explained how their Free Exercise claim differs from their Establishment Clause claim, nor do they explain how they could prevail under the standard in *Smith* if they are unlikely to succeed under RFRA. Because we conclude the Mandate and accommodation scheme are neutral and generally applicable laws, they are subject only to rational basis review, which they survive.

1. Legal Background

The First Amendment's religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. 1. To resolve challenges under the Free Exercise Clause, we use a well- established framework. If a law is neutral and generally applicable, it does not violate the Free Exercise Clause "even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see Smith*, 494 U.S. at 878-80. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United*, 451 F.3d at 649-50. A law that is facially neutral may nevertheless fail the neutrality test if it covertly targets religious

conduct for adverse treatment. *Lukumi Babalu*, 508 U.S. at 534.

To determine whether a law is generally applicable, we ask if the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43. "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United*, 451 F.3d at 649.

2. The Mandate and Accommodation Scheme are Neutral

The Mandate and the accommodation scheme are neutral laws. *See Priests for Life*, 772 F.3d at 267-69; *Mich. Catholic Conf.*, 755 F.3d at 393-94. The Mandate is facially neutral with regard to employers, and neither the history nor the text of the ACA and its implementing regulations suggest the Mandate was targeted at a particular religion or religious practice. Plaintiffs cannot show Congress or HHS "had as their object the suppression of religion." *Lukumi Babalu*, 508 U.S. at 542. To the contrary, the Mandate arose from concerns about the personal and social costs of barriers preventing women from receiving preventive care, including reproductive health care. *See* IOM, *Clinical Preventive Services for Women: Closing the Gaps* 102-03 (2011), *available at* www.nap.edu/catalog.php?record_id=13181. The accommodation scheme was developed to facilitate the free exercise of religion, not to target religious groups or burden religious practice. To that end, the Departments expanded the religious employer

exemption and religious non-profit organization accommodation to respond to the concerns of religious groups. The Plaintiffs' apparent dissatisfaction with the accommodation offered to them does not mean the Mandate or the accommodation scheme is non-neutral.

3. The Mandate and Accommodation Scheme are Generally Applicable

The Mandate and the accommodation scheme are also generally applicable. *See Priests for Life*, 772 F.3d at 267-69; *Mich. Catholic Conf.*, 755 F.3d at 393-94. Plaintiffs cannot show Congress or the Departments sought to impose the Mandate only against religious groups; to the contrary, the Mandate applies to all employers with more than fifty employees using non-grandfathered health plans.[52] "The exemptions do not

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[52] *Smith* stated that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (quotations and citation omitted). But as we noted in *Grace United*, "we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption." *Grace United*, 451 F.3d at 651. We have instead held:

> a system of individualized exemptions is one that gives rise to the application of a subjective test. Such a system is one in which case-by-case inquiries are routinely made, such that there is an individualized governmental assessment of the reasons for the relevant conduct that invites considerations of the particular circumstances involved in the particular case.

Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir. 2004) (quotations and citations omitted). None of the categorical exemptions enacted by the ACA and its implementing

render the law so under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective." *Priests for Life*, 772 F.3d at 268. Plaintiffs fail to demonstrate the accommodation scheme targets religious conduct or was created with the objective of disfavoring particular faiths. *Lukumi Babalu*, 508 U.S. at 542-43. To the contrary, the Mandate was enacted as part of a larger program of health care reform, and both the exemption for religious employers and the accommodation for religious non- profit organizations demonstrate federal deference to religious liberty concerns and were promulgated to facilitate rather than inhibit the free exercise of religion.

4. The Mandate and Accommodation Scheme Have a Rational Basis

Rather than make an argument based on the rational relationship standard, Plaintiffs instead contend our decision in *Hobby Lobby* precludes us from finding that public health and gender equality, without greater specificity, constitute compelling governmental interests. But, as we have explained, the compelling interest test does not apply; the rational basis test does. *Grace United*, 451 F.3d at 649. The Government observes that in the cases before us, the accommodation scheme rationally serves the twin interests of facilitating religious exercise and filling

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regulations establish a system of individualized objections. And for the reasons detailed above, we believe the accommodation scheme effectively relieves objecting religious non-profit organizations of their obligations.

coverage gaps resulting from accommodating that religious exercise.

On rational basis review, these interests are sufficient. Alleviating governmental interference with religious exercise, which the accommodation scheme does, is a permissible legislative purpose. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987). And we need not scrutinize whether the Government's interest in public health and gender equality is more compelling in this case than in *Hobby Lobby*. We need only determine that public health and gender equality are *legitimate* state interests. We believe they meet this more permissive standard, which is not foreclosed by our compelling interest analysis in *Hobby Lobby*. *See, e.g.*, *Hobby Lobby*, 723 F.3d at 1143 (determining public health and gender equality are too broad to satisfy the compelling interest test but noting "[w]e recognize the importance of these interests").[53] The accommodation scheme advances both the free exercise of religion and the Government's legitimate

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[53] *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (identifying "a compelling interest in eliminating discrimination against women"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984) ("Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."); *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944) (upholding child labor laws against a free exercise challenge on health and welfare grounds); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding a mass vaccination program against a liberty challenge on health and welfare grounds); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (determining a compelling interest in eradicating racial discrimination "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

interests in public health and gender equality. *See Hobby Lobby*, 134 S. Ct. at 2759 ("We therefore conclude that [the accommodation] system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.").

Furthermore, when applying the rational basis test, we are not limited to interests specifically articulated by the Departments. We may look to any conceivable legitimate governmental interest, and "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citations and internal quotations omitted). The more specific governmental interest in health by ensuring access to contraception without cost sharing, which we did not specifically address in *Hobby Lobby*, would constitute a legitimate interest conceivably advanced by the accommodation scheme. *See Hobby Lobby*, 723 F.3d at 1160 (Bacharach, J., concurring) ("[T]he plurality does not mention the public interest that the government had relied on at the preliminary-injunction hearing: the health reasons for promoting employee access to emergency contraceptives."). The Departments' recognized interest in the uniformity and ease of administration of its programs would also meet this standard. *See, e.g.*, *Bowen*, 476 U.S. at 707; *Hernandez*, 490 U.S. at 682; *United States v. Lee*, 455 U.S. 252, 258-59 (1982).

The Mandate and accommodation scheme easily pass the rational basis test. Because the Mandate is both neutral and generally applicable and supported by a rational basis, Plaintiffs fail to make out a

plausible claim under the Free Exercise Clause.

B. Establishment Clause

Plaintiffs contend that exempting churches and integrated auxiliaries from the Mandate but requiring religious non-profit organizations to seek an accommodation violates the Establishment Clause. We disagree. Because the Departments have chosen to distinguish between entities based on neutral, objective organizational criteria and not by denominational preference or religiosity, the distinction does not run afoul of the Establishment Clause.

1. Organizational Distinctions Well-Established in Federal Law

Federal law distinguishes between different types of religious organizations, and as we discuss below, this differentiation is constitutionally permissible. Under the ACA and its implementing regulations, a religious employer "is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.131(a). The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a "longstanding and familiar" distinction in federal law. *Priests for Life*, 772 F.3d at 238; *see also Geneva Coll.*, 778 F.3d at 443 (determining it was permissible for the Departments to base the exemption on the IRC's provision "because that provision was a bright line that was already statutorily codified and frequently applied").

Exempting churches while requiring other

religious objectors to seek an accommodation is standard practice under the tax code. The IRC and other regulations award benefits to some religious organizations—typically, houses of worship—based on articulable criteria that other religious organizations do not meet. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii). Churches, their integrated auxiliaries, and conventions or associations of churches are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000. *See id.* § 508(a), (c)(1)(A). Similarly, churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order need not file tax returns, but religious non-profit organizations with gross receipts above $5,000—even if they are tax-exempt—must file annually. *Id.* § 6033(a). Congress has placed special limitations on tax inquiries and examinations of churches, but not integrated auxiliaries, church-operated schools, or religious non-profit organizations. *See id.* § 7611.

Congress has used similar organizational distinctions in the realm of religious accommodations. Churches and qualified church-controlled organizations that object to paying Social Security and Medicare taxes for religious reasons may opt out of paying them by filing a form with the IRS, but other religious non-profit organizations may not. *See id.* § 3121(w).

2. Organizational Distinctions and Respecting the Religion Clauses

Distinctions based on organizational form enable the government to simultaneously respect both the Free Exercise Clause and Establishment Clause and permit the construction of accommodation schemes that pass constitutional muster. The Supreme Court has concluded

> [t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970); *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 469 (N.Y. 2006) (observing the Plaintiffs' argument here "would call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all," and thus concluding "[a] legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause"). We recognize the Government enjoys some discretion in fashioning religious accommodations, and believe doing so on the basis of organizational form comports with the Establishment Clause.

3. Organizational Distinctions Compatible with *Larson* and *Colorado Christian*

The Departments have offered the accommodation to Plaintiffs based on their organizational form. Plaintiffs rely on the decisions in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008), to support their Establishment Clause claim. But those cases do not hold that distinctions based on organizational type are impermissible.

Larson involved an Establishment Clause challenge to a Minnesota law that imposed registration and reporting requirements on religious organizations that received less than half of their contributions from members or affiliated organizations. *Larson*, 456 U.S. at 231. The legislature drew this distinction to discriminate against particular religions, which was evident in the legislative history. *Id.* at 253-54 ("[T]he history of [the challenged law] demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others."). *Colorado Christian* differentiated institutions based on intrusive inquiries into their degree of religiosity. 534 F.3d 1259. In *Colorado Christian*, we concluded Colorado's exclusion of "pervasively sectarian" institutions from state scholarship programs violated the First Amendment "for two reasons: the program expressly discriminates among religions without constitutional justification, and its criteria for doing so involve unconstitutionally intrusive scrutiny of religious belief and practice." *Id.* at 1250. Neither of these two concerns in *Colorado Christian* is applicable here.

Larson and *Colorado Christian* prohibit preferences based on denomination (e.g., Catholic, Jewish, Islamic, etc.) and religiosity (e.g., pervasively sectarian, moderately sectarian, non-sectarian, etc.), but do not prohibit distinctions based on organizational type (e.g., church, non-profit, university, etc.). As *Larson* noted: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 456 U.S. at 244. In *Colorado Christian*, we determined that "defendants supply no reason to think that the government may discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in." 534 F.3d at 1259. As a result, Establishment Clause jurisprudence clearly indicates denominational preferences expressed by the government are subject to strict scrutiny. *See id.* Religiosity distinctions are subject to strict scrutiny as well because they involve the government in scrutinizing and making decisions based on particular expressions of religious belief. *See id.* at 1256 (invalidating Colorado law because it "expressly discriminates *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice").

Plaintiffs cite no case holding that organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause. Unlike *Awad v. Ziriax*, 670 F.3d 1111, 1128-29 (10th Cir. 2012), which concerned a state constitutional amendment forbidding courts

from considering or using Sharia law, evidence of animus or favoritism aimed at a denomination or degree of religiosity is absent here. "Because the law's distinction does not favor a certain denomination and does not cause excessive entanglement between government and religion, the framework does not violate the Establishment Clause." *Mich. Catholic Conf.*, 755 F.3d at 395; *see also Priests for Life*, 772 F.3d at 272-74.

Neither *Larson* nor *Colorado Christian* supports Plaintiffs' claim that distinctions between churches and other religious entities is impermissible. As we concluded in *Colorado Christian*, "if the State wishes to choose among otherwise eligible institutions, it must employ neutral, objective criteria rather than criteria that involve the evaluation of contested religious questions and practices." 534 F.3d at 1266. This is what the Departments have done with the accommodation scheme in compliance with the First Amendment's Establishment Clause.

4. Plaintiffs' Argument Based on the Departments' Rationale

Plaintiffs seize on the Departments' rationale for the distinction that religious non- profit organizations are more likely than churches to employ individuals who do not share their employers' beliefs but are nevertheless entitled to contraceptive coverage under the ACA. *See* 78 Fed. Reg. at 39,874 ("Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use

contraceptive services even if such services were covered under their plan."). Plaintiffs argue some denominations are less likely to carry out ministry functions through a church or integrated auxiliary than others, and that the workforces of some non-profit institutions may be more religiously homogenous than the workforces of some established churches.

The Departments' rationale may not be perfectly accurate, but it does not make the accommodation scheme unconstitutional. The class of religious non-profit organizations encompasses a vast array of religiously affiliated universities, hospitals, service providers, and charities, some of them employing thousands of people. Of course, some religious non-profit organizations may be more likely than some churches to employ co- religionists, but the Departments may reasonably recognize that, on the whole, churches are more likely to employ those who share their beliefs. *Priests for Life*, 772 F.3d at 272. The Departments originally exempted religious employers to "respect[] the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed. Reg. at 46,623. We recognize that relationship between houses of worship and ministerial employees has been given special solicitude under the First Amendment. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 712-13 (2012). The Departments must avoid inquiries that involve them in "excessive entanglement" between religion and government, *see Colorado Christian*, 534 F.3d at 1261-62, and the general notion that houses of worship are more likely than religious non-profit organizations to employ

people of the same faith avoids impermissible scrutiny into the beliefs of religious entities and their employees.[54]

* * * *

Drawing a distinction between religious employers and religious non-profit organizations is a neutral and reasonable way for the Departments to pursue their legitimate goals in a constitutional manner. It gives special solicitude to churches to facilitate the liberties guaranteed by the Free Exercise Clause, and offers the accommodation scheme to relieve religious non-profit organizations of their obligation to provide contraceptive coverage under the Mandate without imposing a substantial burden on their religious exercise. The accommodation scheme does not violate the Establishment Clause.

C. Free Speech Clause

Plaintiffs finally contend the accommodation scheme violates the Free Speech Clause of the First Amendment, which states that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. 1, by compelling them both to speak and remain silent, *see Riley v. Nat'l Fed'n of the Blind*

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[54] The original definition of "religious employer" required that the employer "primarily employs persons who share its religious tenets [and] primarily serves persons who share its religious tenets." 76 Fed. Reg. at 46,623. In response to religious entities that argued these requirements might involve excessive entanglement with religion, the Departments eliminated three of the four criteria and based the definition solely on organizational form. 78 Fed. Reg. at 8459. Plaintiffs now contend that simplified definition makes unfounded assumptions about who religious employers employ.

of N.C., Inc., 487 U.S. 781, 796-97 (1988). First, they argue that requiring them to sign and deliver the Form or the notification to HHS constitutes compelled speech. Second, they argue that prohibiting them from influencing their TPAs' provision of contraceptive coverage compels them to be silent. Both arguments fail.

1. Compelled Speech

The compelled speech claim fails. To the extent such a claim requires government interference with the plaintiff's own message, *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (stating a compelled speech claim arises when "an individual is obliged personally to express a message he disagrees with, imposed by the government"), the regulations do not require an organization seeking an accommodation to engage in speech it finds objectionable or would not otherwise express. The only act the accommodation scheme requires is for religious non-profit organizations with group health plans to sign and deliver the Form or notification expressing their religious objection to providing contraceptive coverage. The Sixth Circuit reasoned: "Even assuming the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim." *Mich. Catholic Conf.*, 755 F.3d at 392; *see also Geneva Coll.*, 778 F.3d at 438-39 ("If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage."). Plaintiffs cannot point to speech they are required to

express and find objectionable.[55]

Indeed, Plaintiffs have not shown any likelihood that their sending in the Form or the notification would convey a message of support for contraception. Plaintiffs do not demonstrate their TPA, their health insurance issuer, or HHS—any one of which would be the sole recipient of the Form or notification—would view it as anything other than an objection to providing contraception. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006), is instructive. In *FAIR*, a group of law schools challenged the Solomon Amendment, a federal statute that denied federal funding to universities that barred military recruiters from their campuses. At that time, the military did not permit gay, lesbian, and bisexual individuals to serve. The schools claimed a First Amendment compelled speech violation, arguing their compliance with the Solomon Amendment would signal their agreement with this policy. The Supreme Court rejected the argument, noting compliance did not signal agreement with the military's positions, and the Solomon Amendment did not prevent the schools from making their own position clear. *FAIR*, 547 U.S. at 65.

This point is even stronger in the instant case, where Plaintiffs would send the Form or notification to convey their *opposition* to providing contraception, and the ACA and implementing regulations do not

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[55] In *Axson-Flynn*, we recognized that a compelled speech claim may apply to non-ideological speech. We held a University of Utah theater student had alleged a compelled speech violation because she was required to utter certain swear words as part of a script and objected to doing so on religious grounds. 356 F.3d at 1284 n.4.

prevent them from expressing that opposition widely. Plaintiffs remain free to express opposition to contraception; "[n]othing in the[]final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives." 78 Fed. Reg. at 39,880 n.41. With the passage of the interim final rule, Plaintiffs also have the option to send a letter or email to HHS expressly objecting to any provision of contraception. They can fully explain their position in that notification. We are especially unconvinced that this option, freed from the text of the Form and permitting greater self-expression, forces Plaintiffs to engage in unwanted speech. Plaintiffs have not suggested the notification must be conveyed or communicated to any third parties or wider audience aside from the Departments themselves.

Even if Plaintiffs could identify speech they disagreed with—for example, identifying the name of their TPA or health insurance issuer—the argument that they are forced to send a message they do not wish to send is unavailing. The First Amendment does not—and cannot—protect organizations from having to make any and all statements "they wish to avoid." The cases cited by Plaintiffs are not about routine administrative burdens akin to complying with the accommodation scheme. These cases instead concern compelled ideological expression such as salutes to the flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943); messages on license plates, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), *Cressman v. Thompson*, 719 F.3d 1139, 1152 (10th Cir. 2013); wearing school slogans, *Frudden v. Pilling*, 742 F.3d 1199, 1203-04 (9th Cir. 2014); and taking a political stance on commercial sex, *Agency for Int'l Dev. v.*

Alliance for Open Soc'y Int'l, Inc., 133 S. Ct. 2321, 2331 (2013).

"Compelling an organization to send a form to a third party to claim eligibility for an exemption 'is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.'" *Priests for Life*, 772 F.3d at 271 (quoting *FAIR*, 547 U.S. at 62). "That would be the equivalent of entitling a tax protester to refuse on First Amendment grounds to fill out a 1099 form and mail it to the Internal Revenue Service." *Wheaton College*, 2015 WL 3988356, at *8. None of the cases cited by Plaintiffs involve compliance with the administrative requirements of a government program, and especially not a government program designed to exempt and distance an organization from activity it finds objectionable.

We finally note that Plaintiffs' signature and delivery of the Form or notification to HHS is "plainly incidental to the . . . regulation of conduct" and thus is not protected speech. *FAIR*, 547 U.S. at 62. The act of signing and delivering the Form or notification to HHS is required to opt out of the Mandate. The Supreme Court has "rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' Instead, we have extended First Amendment protection only to conduct that is inherently expressive." *Id.* at 65-66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The fact that Plaintiffs must complete the Form or notification to HHS to opt out of coverage does not render the act

inherently expressive. *See id.* at 62.

For the foregoing reasons, we reject Plaintiffs' compelled speech claim.

2. Compelled Silence

We further reject the claim that the accommodation scheme compels Plaintiffs' silence. Like the Sixth and Seventh Circuits, we note Plaintiffs have made only general claims objecting to the non-interference regulation and have failed to indicate how it precludes speech in which they wish to engage. *Mich. Catholic Conf.*, 755 F.3d at 392- 93; *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 561 (7th Cir. 2014), *vacated and remanded sub nom.*, *Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015). After the issuance of the interim final rule repealing the non-interference regulation, we do not believe this question is before us. We agree with the Government and the D.C. Circuit that the repeal of the non-interference rule renders Plaintiffs' claims regarding compelled silence moot. *See Priests for Life*, 772 F.3d at 242 n.8.

VII. CONCLUSION

We have reviewed the district courts' decisions to grant or deny a preliminary injunction to Plaintiffs in the three cases before us. Because we determine the ACA and its implementing regulations do not substantially burden Plaintiffs' religious exercise or violate the Plaintiffs' First Amendment rights, Plaintiffs have not established a likelihood of success on the merits or a likely threat of irreparable harm as required for a preliminary injunction. *See Hobby Lobby*, 723 F.3d at 1128.

We therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6 F. Supp. 3d 1225, and reverse the district courts' grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265, and *Reaching Souls*, 2013 WL 6804259.

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf	

of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____ Signature of the individual listed above _____ Date
The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement. <u>Notice to Third Party Administrators of Self-Insured Health Plans</u> In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization: (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A. As an alternative to using this form, an eligible organization may provide notice to the Secretary of

Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50

minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

Little Sisters et al. v. Burwell, Nos. 13-1540, 14-6026, 14-6028

BALDOCK, Circuit Judge, dissenting in part.

Today the Court holds, among other things, that the ACA contraceptive Mandate's accommodation scheme does not substantially burden religious non-profits that object to facilitating contraceptive or abortifacient coverage because opting out does not cause, authorize, or otherwise facilitate such coverage.[1] The Court's opinion provides perhaps the most thorough explanation of the accommodation scheme's nuanced mechanics that I have yet read. And for argument's sake, I follow its holding as to the *insured* plaintiffs' and *Little Sisters* plaintiffs' RFRA claims.[2] But I cannot join the Court's holding as to the other *self-insured* plaintiffs' RFRA claims, as that holding contradicts the Court's own reasoning and thorough explanation of the accommodation scheme.

In reality, the accommodation scheme forces the self-insured plaintiffs to perform an act that causes their beneficiaries to receive religiously objected-to coverage. The fines the government uses to compel this act thus impose a substantial burden on the self-insured plaintiffs' religious exercise. Moreover, less restrictive means exist to achieve the government's

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[1] For consistency, I adopt the Court's glossary.

[2] As I explain below, the *Little Sisters* plaintiffs, though self-insured, have not shown that their opting out will necessarily cause their plan participants and beneficiaries to receive contraceptive coverage. Accordingly, my use of the term "self-insured plaintiffs" does not refer to the Little Sisters unless otherwise stated.

contraceptive coverage goals here. I must therefore dissent in part.

I. WHEN IS A BURDEN ON RELIGIOUS EXERCISE "SUBSTANTIAL?"

The first step of a RFRA claim requires plaintiffs to show (1) that the federal government has imposed a substantial burden on a (2) sincere (3) exercise of religion. *See* 42 U.S.C. § 2000bb-1(a). The unique threshold question we and so many other courts are currently grappling with, however, is how to determine whether a substantial burden exists where a law compels religious adherents to perform an act they sincerely oppose when this opposition might be based on a faulty understanding of the law. *See, e.g.*, *E. Tex. Baptist Univ. v. Burwell*, 2015 WL 3852811, at *3 (5th Cir. June 22, 2015).

Several learned judges have argued compellingly that, under *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is "substantial" under RFRA. *See, e.g.*, *Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 17–22 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from the denial of rehearing en banc); *id.* at 35 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring);

see also Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1137 (10th Cir. 2013) ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *cf. E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2031–33 (2015) (analyzing a plaintiff's exercise as a "religious practice" under Title VII where the act was motivated by "her understanding of her religion's requirements").

These judges assert that whether religious objectors properly understand the legal significance of the compelled act has no bearing on the substantial burden analysis. *E.g. Priests For Life.*, No. 13-5368, slip op. at 35 (Kavanaugh, J., dissenting) ("But what if the religious organizations are misguided in thinking that this scheme . . . makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA."). And *Hobby Lobby* supports this position well, as questioning a religious adherent's understanding of the significance of a compelled action comes dangerously close to questioning "whether the religious belief asserted in a RFRA case is reasonable"—a "question that the federal courts have no business addressing." *Hobby Lobby*, 134 S. Ct. at 2778.

Under this understanding of RFRA, the accommodation scheme substantially burdens any religious non-profit that objects to performing an act that would cause or otherwise make it complicit in providing contraceptive coverage simply because the scheme uses substantial fines to compel an act that the non-profit sincerely believes would have that

effect. The actual legal significance of the compelled act is irrelevant to the substantial burden analysis. And because the government has conceded (2) the sincerity of (3) the religious exercise at issue, the only issue left to address is whether the government has shown that the accommodation scheme survives strict scrutiny. The judges who take this position, so far, all agree that the government has not made this showing. *Priests For Life*. No. 13-5368, slip op. at 22–25 (Brown, J., dissenting); *id.* at 46–51 (Kavanaugh, J., dissenting); *Notre Dame*, 786 F.3d at 629–30 (Flaum, J., dissenting); *Eternal Word Television Network*, 756 F.3d at 1348–49 (Pryor, J. specially concurring).

Notwithstanding the strength of those positions, I will proceed under the following assumptions to highlight an even deeper problem lurking within the self-insured accommodation scheme: First, I will assume that whether a burden on religious exercise is "substantial" turns not only on the amount of coercion the government uses to compel an act (no one disputes the substantiality of the fines at issue here), but also on "how the law or policy being challenged actually operates and affects religious exercise." Slip Op. at 39. Second, I will assume this Court may tell a religious adherent she does not face a substantial burden on her religious exercise if her understanding of the law is flawed. Third, I will assume that any burden the accommodation scheme imposes on Plaintiffs— who object to performing any act that would cause or otherwise make them complicit in providing various forms of contraceptive coverage—cannot be substantial unless they show, for example, how their compelled act causes that coverage. *See* Slip Op. at 45–66.

The Court tells Plaintiffs they cannot make this showing "because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage." Slip Op. at 65. If showing this causation is a prerequisite to establishing a substantial burden, the Court properly rejects the *insured* plaintiffs' RFRA claim, as their action or inaction will not affect whether their plan beneficiaries receive objected-to coverage. But the *self-insured* plaintiffs' inaction will prevent their plan beneficiaries from receiving the coverage. If their beneficiaries receive this coverage, it is only because the self-insured plaintiffs, by opting out, *caused that effect*. Thus, the self- insured plaintiffs have shown how their opting out would cause the provision and receipt of objected-to coverage and established a substantial burden on their religious exercise.

I. THE CRITICAL DISTINCTION IN THIS CASE

I have nothing to add to the Court's summary of the background in these cases, and very little to add to its explanation of the detailed mechanics of the ACA accommodation scheme. But a critical distinction within scheme bears repeating. Under the ACA accommodation scheme, in the *insured* health plan context, "a health insurance issuer . . . would be obligated to provide contraceptive coverage under the ACA whether or not [the insured non-profit] delivered the Form or notification to HHS." Slip Op. at 48 n.28 (citing 42 U.S.C. § 300gg-13). But in the *self-insured* context, a TPA would be "*authorized* and obligated to provide the coverage . . . *only if* the religious non-profit . . . opts out." Slip Op at 49 (emphases added); *see also* 26 C.F.R. § 54.9815-2713AT(b)(2); 29 C.F.R. §

2590.715-2713A(b)(2).

The Fifth, Sixth, and Seventh Circuits failed to recognize this distinction. *See E. Tex. Baptist*, 2015 WL 3852811, at *5; *Notre Dame*, 789 F.3d at 614; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 387 (6th Cir. 2014) *cert. granted, judgment vacated* 135 S. Ct. 1914 (2015). The Third and D.C. Circuits failed to appreciate its significance. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 438 (3d Cir. 2015); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254–56 (D.C. Cir. 2014). This Court considers the distinction "unremarkable." Slip Op. at 49. I disagree. The distinction makes a difference, and juxtaposing the insured plaintiffs and self-insured plaintiffs forces that difference into bold relief.

A. The Insured Plaintiffs

Assuming causation is key, I agree the accommodation scheme does not substantially burden the *insured* plaintiffs' religious exercise. As the Court explains, even total inaction on the part of an insured non-profit still results in its plan participants and beneficiaries receiving the coverage to which they are entitled under the ACA because the government has independently obligated a third party (insurance issuers) to provide it.[3] *See* Slip Op. at 46–47. Opting

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[3] Even the government's proffered fourth option—declining to sponsor a group health plan—would not interfere with contraceptive coverage for the insured plaintiffs' plan beneficiaries. Without an employer-sponsored plan, these beneficiaries would have to find other health insurance. *See Nat'l*

out in the insured context does not cause the receipt of contraceptive coverage; rather, it merely absolves the eligible insured non- profit of any responsibility for the contraceptive coverage its plan participants and beneficiaries will receive *whether it opts out or not*. Thus, assuming Plaintiffs must show how opting out causes coverage, the accommodation scheme does not substantially burden the *insured* plaintiffs' exercise of religion. The insured accommodation is more akin to traditional conscientious objector schemes: the government can and will conscript the actors it needs to achieve its goals whether objectors opt out or not.

The same cannot be said of the self-insured plaintiffs, however.

B. The Self-Insured Plaintiffs

Unlike the *insured* plaintiffs, the ACA leaves the *self-insured* plaintiffs in a position where, by refusing to opt out, they can prevent their plan beneficiaries from receiving the objected-to coverage the beneficiaries are entitled to and would otherwise receive under the ACA. In other words, their plan participants and beneficiaries will receive the coverage *only if* they opt out as the government commands. This makes their opting out a but-for cause of the receipt of the coverage.

The Court views this ability to prevent contraceptive coverage by inaction as nothing more than the ability to disobey the law. *See* Slip Op. at 54–

Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2664 (2012) (Scalia, J., dissenting). And that insurance would likely cover contraceptives. *See* 42 U.S.C. § 300gg-13

55 & n.35. But that is the same limited ability the plaintiffs in *Hobby Lobby* possessed, and it goes to the heart of the substantial burden the self-insured plaintiffs face here. "In *Hobby Lobby*, the plaintiff[s] . . . could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties." Slip Op. at 3 (citing *Hobby Lobby*, 134 S. Ct. at 2759–60). Similarly, these self-insured plaintiffs must choose between (1) complying with the ACA by taking an action that ultimately causes their beneficiaries to receive this coverage or (2) not complying and paying significant penalties. This is a Hobson's choice, which we have long held imposes a substantial burden under RFRA. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) ("We conclude that a religious exercise is substantially burdened under [RFRA] 42 U.S.C. § 2000cc–1(a) when a government . . . presents the plaintiff with a Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Hobby Lobby*, 723 F.3d at 1141 (10th Cir. 2013) (explaining that the choice between compromising religious beliefs and paying fines under the ACA "is precisely the sort of Hobson's choice described in *Abdulhaseeb*").

1. The Obvious Causal Connection

If causation is key to showing a substantial burden, *see* Slip Op. at 32–33, 45–66, the self-insured plaintiffs have surely shown that burden. Certainly, a shifting legal responsibility alone may not necessarily create a causal relationship. But here, the self-insured plaintiffs' opt out causes the coverage because (1) the government cannot force plaintiffs themselves

to provide the coverage, *Hobby Lobby*, 134 S. Ct. at 2785, and (2) the government cannot shift the ability (let alone the responsibility) to provide the coverage to non-objectors unless the self-insured plaintiffs opt out. *See* 29 C.F.R. § 2590.715-2713A(b)(2); Slip Op. at 48–49. Opting out is thus the only way their plan participants and beneficiaries may receive the coverage.

Put another way, if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries? The answer: no one. The self- insured plaintiffs cannot do so per their faith; the TPAs cannot do so per the law. Thus, the self-insured accommodation renders any duty to provide, and any entitlement to receive, contraceptive coverage wholly unenforceable and thus illusory—unless and until the self-insured plaintiffs opt out. *Cf. Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 819 (10th Cir. 2008) (unpublished) ("[W]hen a promise, in reality, promises nothing—it is illusory." (Internal marks and citation omitted)).

To fully understand why no one can or will provide this objected-to coverage unless the self-insured plaintiffs perform a compelled act, one must view the ACA Mandate and accommodation scheme in light of *Hobby Lobby*. *Hobby Lobby* clearly holds forcing religious employers to provide objected-to contraceptive coverage violates RFRA. 134 S. Ct. at 2785. So, if any entity is to provide the coverage, it must be a third party. The *insured* accommodation independently conscripts third parties to provide the coverage. But as this Court points out, the *self-insured* accommodation was drafted such that no

third party can provide the coverage in the self-insured context unless and until the objecting religious employer opts out. Slip Op. at 48–49; *see also Eternal Word Television Network*, 756 F.3d at 1347 (Pryor, J., specially concurring) (explaining that, without the Form or letter, a TPA "has no legal authority to step into the shoes of the [non-profit] and provide contraceptive coverage to the employees and beneficiaries of the [non-profit]"). As such, a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out.

The Court believes we should focus on the fact that the ACA "entitle[s] plan participants and beneficiaries to coverage whether or not the plaintiffs opt out" and imposes a duty on "either the religious non-profit organization or the TPA" to provide that coverage. Slip Op. at 33, 57. But this reasoning (1) fails to consider the ACA Mandate in light of the limitations *Hobby Lobby* already imposed, and (2) confuses legal concepts (duty and entitlement) with real-world effects (provision and receipt).

First, the Court's focus on the ACA's requirement that "either the religious non- profit organization or the TPA" provide the coverage, Slip Op. at 57, ignores the fact that the government cannot require the religious non-profit to provide the coverage under *Hobby Lobby*. By ignoring the limitation *Hobby Lobby* imposes on the government, the Court simultaneously acknowledges that "opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage," Slip Op. at 56, and nevertheless rejects the self-insured plaintiffs' RFRA claims for lack of causation. Slip Op. at 64–65. But

again, *Hobby Lobby* forbids the government from placing this requirement on the non-profits themselves. So if opting out is necessarily a but-for cause of someone else providing the coverage, it is necessarily a but-for cause of anyone providing the coverage *at all*. Essentially, the Court concedes but-for cause and then turns around and denies the existence of any causation. What?

Second, the Court asserts that the self-insured plaintiffs' opt out will not cause the actual provision and receipt of objected-to coverage because the ACA creates an independent, albeit illusory, duty and entitlement related to that coverage. True, opting out does not cause *entitlement* to contraceptive coverage—the ACA entitles all health plan beneficiaries to contraceptive coverage. But these beneficiaries will not *receive* that coverage unless the self-insured plaintiffs do something to cause its provision from a third party. In other words, the ACA may independently say "someone" has a *duty* to provide contraceptive coverage, *see* 29 C.F.R. § 2590.715–2713, but no one can or will honor that duty and *provide* the coverage unless the self-insured plaintiffs opt out. No self-insured plaintiff will honor it because the government cannot force them to under *Hobby Lobby*, and no third party can honor it because no third party has authority to do so without an opt out. Based on this error, the Court concludes that "federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will *receive* contraceptive coverage." Slip Op. at 52 (emphasis added). But that is simply wrong. As explained above, federal law alone does not ensure receipt of the coverage from the self-insured plaintiffs; and it does

not even allow, let alone ensure, receipt of that coverage from a third party unless the self-insured plaintiffs opt out. Rather, federal law, *only in conjunction with the self-insured plaintiffs' opt out*, allows plan participants and beneficiaries to receive contraceptive coverage.[4]

These errors, taken together, cause the Court to reject a straw man rather than the self-insured plaintiffs' RFRA claims. The self-insured plaintiffs do not claim a RFRA violation based on the fact that the ACA created an entitlement to contraceptive coverage; they object to the causal role they must play in providing that coverage.[5]

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[4] Even with the opt-out, federal law does not always *ensure* receipt of the coverage. For example, the Court asserts "the ACA ensures plan participants and beneficiaries will *receive* contraceptive coverage" but simultaneously contradicts itself by acknowledging that TPAs for self-insured church plans may in fact decline to *provide* that coverage, in which case "plan participants and beneficiaries would not get the coverage to which they are otherwise entitled." Slip Op. at 61 & n.41 (emphases added).

The Court's attempt to paint these contradictory positions as consistent suffers from the same logical flaw highlighted above; that is, it confuses the actual *provision* and *receipt* of coverage with a concededly unenforceable *entitlement* and *duty* to provide it. If the law cannot force an unwilling TPA to provide contraceptive coverage, the TPA will not provide it, and the plan beneficiaries will not receive it. *Cf. Mach Mining, LLC v. E.E.O.C.*, 135 S. Ct. 1645, 1652–53 (2015) (acknowledging that even the government may violate the law, "especially so when [it faces] no consequence"). Thus, the existence of an unenforceable duty to provide contraceptive coverage does not ensure receipt, as this Court seems to believe.

[5] The Court also asserts that religious non-profits "cannot preclude the government from requiring others to provide the

A proper accommodation may relieve otherwise substantial burdens on religious exercise, but this accommodation fails to do so, at least in the self-insured context. And to be sure, "[a] burden does not rise to the level of being substantial when it places an inconsequential or de minimis burden on an adherent's religious exercise." Slip Op. at 41 (quoting *Priests for Life*, 772 F.3d at 246). But here, the accommodation scheme foists upon the self-insured plaintiffs a choice with dire consequences. Either (1) they refuse to act, which would avoid causing their plan beneficiaries to receive objected-to coverage but trigger crippling fines for violating the law or (2) they act, which would cause the receipt of this coverage and violate their faith. If "the purpose of religious accommodation" was to permit religious objectors "to avoid a religious burden and to comply with the law," *see* Slip Op. at 55, it fails to achieve that purpose. Rather, the accommodation foists upon the self-insured plaintiffs a Hobson's choice and thus a substantial burden on their exercise of religion.

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legally required coverage in its stead," Slip Op. at 51–52, and "cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA," Slip Op. at 71. I agree that this *should not* be the case but, unfortunately, the government drafted the self-insured accommodation such that the self-insured plaintiffs *can*, by inaction, do exactly that. As explained above, that is precisely why their opting out causes the receipt of objected-to coverage.

Moreover, to the extent this language connotes dissatisfaction with the problems created by the self-insured accommodation, such dissatisfaction is irrelevant to whether the law imposes a substantial burden under RFRA. Our job is not to "add words to the law to produce what is thought to be a desirable result." *Abercrombie & Fitch*, 135 S. Ct. at 2033.

Abdulhaseeb, 600 F.3d at 1315.

2. This is Not a Conscientious Objector Accommodation Scheme

The Court believes this accommodation scheme akin to the conscientious objector schemes used for military conscription. *See* Slip Op. at 52 n.33. Not so. The accommodation scheme may *function* like a conscientious objector scheme in some regards, but it ultimately forces objectors to play a very different and causal role.

Military conscription law generally requires male citizens to register for the draft and allows the President to draft a certain number of men from that pool of candidates into active duty in the Armed Forces.[6] *See, e.g.*, *Arver v. United States*, 245 U.S. 366, 375–76 (1918) (allowing the President to draft up to two groups of 500,000 men). After registering, conscientious objectors can opt out of serving in combat. 50 App. U.S.C. § 456(j). But they cannot reduce the number of men the President ultimately drafts. Whether objectors lawfully register and opt out, or register and then choose unlawfully to avoid induction, or even choose unlawfully not to register at all, the President can and will draft the same number of men needed for war. *See* LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 14–28 (1978) (explaining that the government's Vietnam draft

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[6] Currently, "every male citizen of the United States . . . between the ages of eighteen and twenty-six" must register in order to facilitate any eventual conscription into the Armed Forces. 50 App. U.S.C. § 453(a).

policies "did not care who was drafted as long as enough people were drafted").

Indeed, the Court's reliance on *Sheridan v. United States*, 483 F.2d 169 (8th Cir. 1973), highlights this difference. In *Sheridan*, the defendant registered for the draft but did not lawfully opt out. Instead, he simply refused to be inducted. *Id.* at 170. But the result under conscription law was the same: "another person [was] called in his place." *Id.* at 174. In other words, like the *insured* plaintiffs, no matter what conscientious objectors do or refuse to do, the government can and will achieve its military draft goals.

The opposite result occurs under the self-insured accommodation scheme. If a *self-insured* plaintiff simply refuses to provide coverage and does not opt out, the government cannot call a third party in its place. The accommodation scheme thus places the self-insured plaintiffs in a very different position vis-à-vis helping the government achieve its religiously objectionable goals. Conscientious objectors cannot prevent the government from conscripting their replacements; but the self-insured plaintiffs can *completely* prevent the government from even authorizing their TPAs to provide objected-to coverage. Conscientious objectors also need not identify a related third party to serve in their stead; but the self-insured plaintiffs must identify a related third party through a form or letter. And this form or letter is the *only means* by which the government can authorize that third party to serve in their stead. Under conscientious objector schemes, the government may independently draft non-objecting Americans into combat to further its war efforts;

conscientious objectors have no power to stop it. But under the self-insured accommodation scheme the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts; their beneficiaries will not receive this coverage unless they commit that act and cause that result. Such a conscientious objector scheme—where the government could draft a replacement soldier *only if* the initial conscientious objector opted out *and* identified a previously ineligible relative to serve in his stead—would be immensely problematic, to say the least.[7]

In relying on conscientious objector schemes the Court commits the same error it levies against this dissent: it fails to appreciate the broader structures of both the accommodation and conscientious objector schemes. In comparing the two schemes, the Court

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[7] The Court attempts to counter this point by referencing the Enrollment Act of 1863, which "permitted a draftee to avoid service only by either providing a substitute or paying $300." Slip Op. at 52 n.33 (quoting Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863)). But this act was a short-lived experiment that did not even survive to the end of that war. Moreover, resentment over the Enrollment Act and its opt-out provision triggered the "New York City draft riot, the largest [and deadliest] civil insurrection in American history apart from the South's rebellion itself." ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 at 32 (1988). "No case questioning the Civil War draft was heard by the Supreme Court, but it is known that Chief Justice Roger Taney prepared a rough outline of an opinion declaring the act unconstitutional." Leon Friedman, *Conscription and the Constitution*, 67 MICH. L. REV. 1493, 1546 (1969). Indeed, one eminent historian called the substitution provision a "grotesque monstrosit[y]" and stated "[t]he government could hardly have devised a worse law." BRUCE CATTON, THE CIVIL WAR 208 (1987). I would call that problematic.

focuses only on the acts the objector must perform to opt out, and what happens if the objector performs those acts. The comparison totally ignores the broader and more critical difference between the two schemes: what happens if the objector refuses to perform those acts? Conscription law requires that "someone" go to war, and in the end "someone" *will* go to war. The law is such that the government can and will shift this legal duty to a non-objector regardless of the objector's action or inaction. Conversely, the ACA says "someone" must provide contraceptive coverage, but the self-insured accommodation was drafted such that if the self-insured plaintiffs choose to do nothing rather than opt out, no one will actually provide that coverage. Again, the government cannot force the plaintiffs to provide the coverage, and it cannot shift the duty to provide the coverage unless the self-insured plaintiffs choose to opt out. If the government could independently shift this duty (as conscription law allows) or eliminate the need to shift the duty at all (as the insured accommodation does) that might eliminate the causal role the self-insured plaintiffs currently face. But presently, the law forces the self-insured plaintiffs into gatekeeping positions and then uses fines to force them to open the gates.

3. The Supreme Court's *Little Sisters* and *Wheaton College* Orders

The Court also believes the accommodation scheme does not impose a substantial burden on self-insured non-profits because the government's new alternative notice accommodation—which forces an objecting non-profit to write a letter to HHS opting out and identifying its TPAs and/or health insurance issuers—is essentially akin to the Supreme Court's

injunctions pending appeal in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and most recently *Zubik v. Burwell*, Nos. 14A1065, 14- 1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015). *See* Slip Op. at 42 n.25, 59 n.39. But the Court's reliance on these interim orders appears to be based on two flawed assumptions: (1) that the notices required by these orders were sufficient to authorize a TPA to provide coverage it could not provide before, and (2) even assuming this dubious interpretation of the orders, that they approved of compelling religious non-profits to play this causal role under RFRA's first step (no substantial burden) as opposed to approving of such compulsion only where it satisfies RFRA's second step (strict scrutiny).

As to the first assumption, the *Little Sisters* order nowhere contemplates allowing the government to use the Little Sisters' interim written notice to facilitate coverage by alternative means. And the *Wheaton College* order did not allow the government to rely on Wheaton's interim written notice, either. Rather, it allowed the government to rely on preexisting knowledge that Wheaton qualified for exemption and would not provide certain contraceptive coverage. *See Wheaton Coll.*, 134 S. Ct. at 2807 ("But [Wheaton] *has already notified the Government*—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on *this notice*, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act." (emphases added)). Moreover, as

Justice Sotomayor's dissent in *Wheaton College* shows, the written notices required in *Wheaton College*, *Little Sisters*, and *Zubik* were insufficient to authorize TPA coverage under the then-effective accommodation, and may remain insufficient even under the new alternative accommodation. *See Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).[8]

To the extent *Wheaton College* allows the government to rely on its knowledge of Wheaton's objection, this merely tracks the Supreme Court's decision in *Bowen v. Roy*, where the Court rejected a Free Exercise challenge to the government's *use* of a social security number it *already possessed* and concluded that the First Amendment does not "require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 693, 699 (1986). But importantly:

> a majority of justices [in *Roy*] indicated that the requirement that applicants *furnish* a social security number was a different matter. Five justices either concluded or strongly suggested that the government could not require an

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[8] That is, even under the new alternative notice scheme, the "information necessary to verify applicants' eligibility under 26 CFR §54.9815-2713A(a)," *see Zubik*, 2015 WL 3947586, at *1, does not contain all the information required by the regulations and thus might not qualify as a valid opt out sufficient to trigger TPA coverage, *see* 29 C.F.R. § 2590.715-2713A(b)(1)(ii)(B) (requiring the self-insured organization to provide, among other things "the plan name and type . . . and the name and contact information for any of the plan's third party administrators"); *Wheaton Coll.*, 134 S. Ct. at 2814 n.6 (Sotomayor, J., dissenting).

> applicant to provide the number on a benefits application if the applicant had a sincere religious objection to doing so.

Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 567 (7th Cir. 2014) (Flaum, J., dissenting) (emphasis in original), *cert. granted, judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *see Roy*, 476 U.S. at 714–16 (Blackmun, J., concurring in part), 732 (O'Connor, J., concurring in part and dissenting in part) ("The rise of the welfare state was not the fall of the Free Exercise Clause."), 733 (White, J., dissenting).

Moreover, the Court may well have expressly allowed for this reliance in *Wheaton College* because, unlike the Little Sisters, Wheaton provides insurance through both self-insured plans *and* insured plans subject to the Mandate. *See Wheaton Coll. v. Burwell*, 50 F. Supp. 3d 939, 944 (N.D. Ill. 2014) (Wheaton "offers its health insurance pursuant to six plans: two insured HMO plans, a [grandfathered] PPO plan, two self-funded prescription drug plans, and an insured student health plan." (footnote omitted)). Thus, unlike the wholly self-insured Little Sisters, the government might independently ensure that an issuer from at least one of these insured health plans provides full contraceptive coverage to at least some of Wheaton's various plan beneficiaries under the current ACA regime without forcing Wheaton to play a causal role in the receipt of that coverage.

Thus, the *Little Sisters*, *Wheaton College*, and *Zubik* orders allow religious non-profits to simply notify the government that they qualify for exemption and will not provide contraceptive coverage. The

government may use its knowledge of these objections when choosing between *independently* available alternative means to ensure coverage is provided (as the conscientious objector and *insured* schemes do). But these orders do not allow the government to compel religious non-profits to furnish the document that is essential to cause their plan beneficiaries to receive objected-to coverage.

And yet, suppose these orders could be read to say that the written notices they required were legally sufficient to authorize a previously ineligible TPA to provide objected-to coverage. Under that dubious interpretation, the orders would indeed force self-insured religious objectors to perform an act that causes the ultimate provision of the coverage, as they would make the provision of the coverage wholly contingent upon the religious objectors' acts of providing HHS with that notice. For all the reasons discussed above, that interpretation of the orders would impose a substantial burden on the self-insured plaintiffs' exercise of religion.

So, turning to the Court's second assumption, even under its dubious interpretation of the orders, the orders nowhere say that forcing religious non-profits to play this sort of causal role avoids imposing a substantial burden on their religious exercise. Instead, assuming the Court's interpretation of these orders is correct, these orders would impose a substantial burden under RFRA's first step and therefore must comply with RFRA's second step (strict scrutiny). Indeed, Judge Kavanaugh has compellingly argued that these orders simply set forth a less restrictive means of achieving the government's compelling interest in facilitating access to

contraceptive coverage. *See Priests For Life*, No. 13-5368, slip op. at 46–51 (Kavanaugh, J., dissenting). These orders do not require religious non-profits to identify related third parties for the government to authorize and possibly conscript in their stead. Rather, they only require the non-profits to inform HHS that they qualify for exemption and will not provide objected-to coverage. As discussed above regarding conscientious objector schemes, a significant difference exists between asking a religious objector to say simply "no" and compelling that objector to identify a related entity to serve as a scapegoat where no one else can.[9]

4. ERISA-Bound Plans v. ERISA-Exempt Church Plans

The burden the self-insured plaintiffs face is most salient with regards to Southern Nazarene, whose TPA is subject to ERISA enforcement and therefore will be not only authorized but also required to provide contraceptives to the participants and beneficiaries of Southern Nazarene's self-insured plan *only if* Southern Nazarene opts out. *See* 29 C.F.R. § 2590.715-2713A(b)(2). Southern Nazarene's opt out will thus clearly cause someone to provide contraceptive coverage where no one would or could before.

But the lack of an enforcement mechanism as to ERISA-exempt church plans does not itself remove the causal role and substantial burden that the

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[9] Moreover, this less restrictive means of achieving the same goal necessarily dooms the current self-insured accommodation scheme under strict scrutiny. *See infra* Part III.

accommodation scheme foists upon the church-plan plaintiffs. For example, the Guidestone Plan is an ERISA- exempt church plan, but at least one of its TPAs, Highmark, has indicated it will provide full contraceptive coverage for those self-insured organizations that use the Guidestone Plan and validly opt out. And plaintiffs Reaching Souls, Truett-McConnell College, and Mid-America Christian University are all self-insured plaintiffs that use the Guidestone Plan. Slip Op. at 21; SN Supp. Br. II at 9 n.2. So even though their opting out might not trigger an *enforceable* duty to provide objected-to coverage, these church plan plaintiffs have established that their opting out will actually cause Highmark to provide the coverage—coverage it cannot provide unless they opt out.

True, given the repeal of the accommodation scheme's non-interference provision, church plans like the Guidestone Plan might try to fire TPAs like Highmark and replace them with TPAs that promise not to provide coverage for objected-to contraceptives, and those plaintiffs that use the Guidestone Plan might be able to fire Guidestone if it refuses to do so. *See* RS Oral at 12:57–13:10. Thus, by economic coercion, these plaintiffs might be able to ultimately stop the provision of the coverage they were initially forced to cause. But, the government maintains that "such conduct is generally unlawful and is prohibited under . . . state and federal laws." *See* 79 Fed. Reg. at 51,095. And none of this changes the present fact that if plaintiffs who use the Guidestone Plan opt out, they will cause Highmark to perform a religiously objected-to act on their behalf where Highmark previously could not do so. Thus, those self-insured plaintiffs that

use the Guidestone Plan have shown "presently threatened injuries" warranting injunctive relief. *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).

The *Little Sisters* plaintiffs, on the other hand, have not established this causal connection. The Little Sisters' primary TPA, Brothers Services, is not bound by ERISA and has promised not to provide contraceptive coverage even if Little Sisters opts out. Little Sisters asserts that Brothers Trust also uses other TPAs who might choose to provide contraceptive coverage if they opt out, but they have not sufficiently developed this theory to bear the burden of establishing that their opting out will presently cause someone to provide contraceptive coverage to their plan beneficiaries.

The Court also suggests self-insured non-profits "could relieve themselves of any lingering doubts they may have about causation by [1] employing an insured plan, [2] employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or [3] administering the self-insured plan on their own in- house without using a TPA." Slip Op. at 52 n.32. But none of these options alleviate the substantial burden the accommodation scheme imposes. First, choosing to switch from a self-insured plan, where no coverage can be provided without an opt out, to an insured plan, where coverage will be provided by a third party, would simply mean choosing to cause that coverage by switching plans rather than opting out. Second, as discussed above, even in the church plan context, opting out may still cause a TPA to provide the coverage. Third, no plaintiff in this case administers its plan in-house. So

to the extent the Court opines on the legal effect the ACA Mandate might have on a plan not at issue in this case, the Court impermissibly exceeds its jurisdiction by "advising what the law would be upon a hypothetical state of facts." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Given that we do not have jurisdiction to pass on this hypothetical, the self-insured plaintiffs should not have to rebut it to prove a present substantial burden under RFRA. But, because the Court goes there, administering a self-insured plan in-house without a TPA can be prohibitively complex, limit options for managing care, and create legal pitfalls that many non-profits simply cannot afford to handle. *See* Thomas R. McLean & Edward P. Richards, *Health Care's "Thirty Years War": The Origins and Dissolution of Managed Care*, 60 N.Y.U. ANN. SURV. AM. L. 283, 313 (2004); *see generally* Rhonda D. Orin and Daniel J. Healy, *Self-Administering, Insuring and Funding Benefit Plans*, 197–213 in HUMAN RESOURCES (Thompson 2007 Summer Edition).

C. Summing Up the Substantial Burden On the Self-Insured Plaintiffs

The Court concludes that the Plaintiffs' causation arguments fail because "opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage." Slip Op. at 65–66. This conclusion is correct in the *insured* context. But the *self-insured* plaintiffs, with the exception of Little Sisters, have shown exactly how their act of opting out will cause someone to provide contraceptive coverage where their refusal to act would prevent that result.

Unfortunately, the Court fails to see this obvious causal relationship because it ignores the clear holding of *Hobby Lobby* and fails to comprehend the difference between unenforceable entitlement and actual receipt. The government has left self-insured plaintiffs in a position where they must decide whether their beneficiaries will actually *receive* objected-to contraceptive coverage. The accommodation does not absolve these plaintiffs of this responsibility. Instead, it forces them to either (1) violate their sincere religious beliefs by performing an action that will cause their beneficiaries to receive objected-to coverage, or (2) violate the law and incur steep fines to obey those religious beliefs. Again, this is a Hobson's choice and thus a substantial burden on their religious exercise under RFRA. *Abdulhaseeb*, 600 F.3d at 1317; *Hobby Lobby*, 723 F.3d at 1141.

III. STRICT SCRUTINY

Because the government has imposed a substantial burden on at least the self- insured plaintiffs' religious exercise, under RFRA it must demonstrate that this burden is "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Our precedent currently holds the government has no compelling interest in contraceptive coverage. *See Hobby Lobby*, 723 F.3d at 1143. But even assuming such a compelling interest, *see Hobby Lobby*, 134 S. Ct. at 2780 (assuming the same), 2785–86 (Kennedy, J., concurring), 2799 (Ginsburg, J., dissenting), the government cannot show this scheme is the least restrictive means of furthering that interest. As discussed above, the Supreme Court's interim orders

in *Little Sisters*, *Wheaton College*, and *Zubik*, even when interpreted so as to force self-insured non-profits to play a necessary causal role in contraceptive coverage, provide a less restrictive means of achieving the same goal. *See Priests For Life*, No. 13-5368, slip op. at 46–51 (Kavanaugh, J., dissenting). The existence of this less restrictive means dooms the current accommodation scheme under strict scrutiny. *Hobby Lobby*, 134 S. Ct. at 2781–82.

IV. CONCLUSION

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. at 2760, a liberty essential to our country's constitutional tradition, albeit with boundaries difficult to define, *see id.* at 2785 (Kennedy, J., concurring). The Court today makes causation one of those boundaries. Even assuming this boundary, however, the self-insured plaintiffs in this case, with the exception of the *Little Sisters* plaintiffs, have clearly shown how their compelled act will cause their plan beneficiaries to receive objected-to coverage that they could not otherwise receive. Therefore, I dissent from the Court's holding regarding these self- insured plaintiffs. Even assuming a causation requirement, I would still hold these self- insured plaintiffs have shown a substantial likelihood of success on the merits of their RFRA claim and that the other requirements for a preliminary injunction are met. I would therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6 F. Supp. 3d 1225, affirm the district court's grant of a preliminary injunction in *Reaching Souls*, 2013 WL 6804259, and affirm in part (as to the self-insured plaintiffs: Southern Nazarene University

and Mid-America University) and reverse in part (as to the insured plaintiffs: Oklahoma Baptist University and Oklahoma Wesleyan University) the district court's grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265.

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*

No. 13A691

ORDER IN PENDING CASE

The application for an injunction having been submitted to Justice Sotomayor and by her referred to the Court, the Court orders: If the employer applicants inform the Secretary of Health and Human Services in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged

provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of the appeal by the United States Court of Appeals for the Tenth Circuit. To meet the condition for injunction pending appeal, applicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martinez

Civil Action No. 13-cv-2611-WJM-BNB

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
DEFENDANTS

ORDER DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In this case, Catholic religious organizations challenge the regulations implementing the Patient Protection and Affordable Care Act, Pub. L. 111-148, specifically the requirement that group health care plans provide all women coverage for certain preventative contraception services without a co-

payment or deductible.

Before the Court are the following: (1) Plaintiffs' Motion for Preliminary Injunction (ECF No. 15); and (2) Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment (ECF No. 30). For the reasons set forth below, the Court finds that Plaintiffs have standing to bring this action and, therefore, the standing portion of the Motion to Dismiss is denied. The remainder of the issues raised in the Motion to Dismiss remain pending and will be ruled on by way of subsequent order. The Court also denies Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

A. HISTORY OF THE CHALLENGED REGULATIONS

The Patient Protection and Affordable Care Act (the "ACA") requires that group health insurance plans cover certain preventative medical services without cost-sharing, *i.e.*, a co-payment or a deductible. Among the preventative services that must be covered are contraception, sterilization, and related counseling (the "Mandate"). As set forth in more detail below, the Mandate results from extensive and complex Congressional legislation and agency rulemaking by the Department of Labor ("DOL"), the Department of the Treasury ("DOT"), and the Department of Health and Human Services ("HHS") (collectively, the "Departments").

In March 2010, Congress enacted the ACA along with the Health Care and Education Reconciliation Act. These acts placed a variety of new requirements on "group health plans," a term which encompasses both insured and self-insured employer plans that provide health care coverage to employees. *See* 42

U.S.C. § 300gg-91(a)(1) (defining "group health plan"); Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726, 41,727 (July 19, 2010) ("Interim Final Rules") ("The term 'group health plan' includes both insured and self-insured group health plans."). The portion of these acts that is relevant to this action is the requirement that group health plans provide coverage—at no charge to the patient—for women's "preventative care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration[.]" *See* 42 U.S.C. § 300gg-13(a)(4).

Because there were no existing guidelines concerning preventative care and screenings for women at the time of the Interim Final Rules, the Health Resources and Services Administration ("HRSA") commissioned the Institute of Medicine ("IOM"), a Congressionally-funded body, to conduct a study on preventive services necessary to women's health. The IOM, in a report entitled "Clinical Preventive Services for Women: Closing the Gaps," recommended that "preventative care and screenings" include "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Women's Preventive Services: Required Health Plan Coverage Guidelines, health resources and services administration, http://www.hrsa.gov/womensguidelines/ (last visited December 19, 2013). Among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives, and

intrauterine devices.

HRSA adopted the IOM's recommendations on August 1, 2011. Two days later, the Interim Final Rules were amended to "provide HRSA additional discretion to exempt certain religious employers from the [HRSA] Guidelines where contraceptive services are concerned." Group Health Plan and Health Insurance Issuers Relating to Coverage of Preventative Services under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,623 (Aug. 3, 2011); *see also* 45 C.F.R. § 147.130(a)(1)(iv)(A). The amended Interim Final Rules permitted HRSA to exempt a religious organization that: "(1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization under section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code." *Id.*

The Departments received over 200,000 comments on the amended Interim Final Rules, including many submitted by religiously-affiliated institutions asserting that the religious employer exemption was too narrow, and that the limited scope of the exemption raised religious liberty concerns. Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,726-27 (Feb. 15, 2012). Despite these comments, the Departments adopted the definition of religious employer set forth in the Interim Final Rules. *Id.* at 8,727. However, the Departments created a "temporary enforcement safe harbor" of one year during which they intended to "develop and

propose changes to these final regulations that would meet two goals—providing contraceptive coverage without cost-sharing to individuals who want it and accommodating non-exempt, non-profit organizations' religious objections to covering contraceptive services[.]" *Id.*

On March 21, 2012, the Departments published an advance notice of proposed rule-making ("Advance Notice") outlining alternative plans to accommodate religious organizations' objections to the Mandate. *See* Certain Preventative Services under the Affordable Care Act, 77 Fed. Reg. 16,501 (Mar. 21, 2012). The Departments received over 400,000 comments in response to the proposals set forth in the Advance Notice and, in July 2013, issued rules finalizing the Mandate. *See* Coverage of CertainServices under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013) (the "Final Rules").

The Final Rules provide that they accommodate for employers with religious objections to the Mandate in two ways. First, the Final Rules revise the definition of "religious employer" by eliminating the first three requirements contained in the Interim Final Rules. The Final Rules define "religious employer" as simply any non-profit referred to in 26 U.S.C. § 6033(a)(3)(A)(i) or (iii), which includes churches, their integrated auxiliaries, associations of churches, and the exclusively religious activities of religious orders. *See* 78 Fed. Reg. at 39,874.

Second, the Final Rules provide for an accommodation for "eligible organizations" that do not meet the definition of "religious employer". An "eligible organization" is one that meets the following criteria:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974 ["ERISA"].

45 C.F.R. § 147.131(b). The Final Rules state that an eligible organization is not required to "contract, arrange, pay, or refer for contraceptive coverage" to which it has a religious objection. 78 Fed. Reg. at 39,874. Instead, the eligible organization must complete a self-certification form stating that it is an eligible organization, and provide a copy of that form to its issuer (if the employer participates in an insured group healthplan) or to its third party administrator

(if the employer participates in a self-insured health plan). *Id.*

Upon receipt of the self-certification form, a third party administrator for a self-insured group health plan is required to provide or arrange for payments for contraceptive services, a requirement imposed through the Department of Labor's ERISA enforcement authority. *See id.* at 39,879-80. The Final Rules state that an eligible organization's self-certification "will be treated as a designation of the third party administrator(s) as plan administrator and claims administrator for contraceptive benefits pursuant to section 3(16) of ERISA." *Id.* at 39,879.

B. THE PARTIES AND THE PROCEDURAL HISTORY OF THIS CASE

Plaintiff Little Sisters of the Poor Home for Aged, Denver, Colorado is a Colorado non-profit corporation that was founded in 1916. (Compl. (ECF No. 1) 11.) Plaintiff Little Sisters of the Poor, Baltimore, Inc. is a Maryland non-profit corporation that was founded in 1869. (*Id.* 12.) Both homes are controlled by and associated with the Little Sisters of the Poor, an international Congregation of Catholic Sisters who serve needy elderly people. (*Id.* 13.) The Court will refer to these Plaintiffs together as"Little Sisters".

Little Sisters has adopted the Christian Brothers Employee Benefit Trust ("Trust") to provide medical coverage to their employees. (*Id.* 15.) Each Little Sisters home employs more than fifty employees who are covered, along with their dependents, under the Trust. (*Id.* 16.)

The Trust is a "church plan" within the meaning of section 414(e) of the Internal Revenue Code. (*Id.* 21.)

The Trust is not subject to ERISA because it has not made an election under section 410(d) of the Internal Revenue Code. (*Id.* 22.) The Trust is a self-insured health plan and, therefore, does not contract with an insurance company to provide health benefits to its beneficiaries. (*Id.* 23.) Consistent with Catholic teachings, the Trust does not provide, and has never provided coverage for, or access to, contraception, sterilization, abortifacients, and related education and counseling. (*Id.* 25.) The Trust is administered by Plaintiff Christian Brothers Services, a New Mexico non-profit corporation affiliated with The Brothers of The Christian Schools, a male religious order of the Catholic Church. (*Id.* 28.) Christian Brothers Services is a third party administrator for the Trust. (ECF No. 37-1 5.)

Defendants are all appointed officials of the United States government and its agencies charged with issuing and enforcing the regulations implementing the ACA. (Compl. 31.) Defendant Kathleen Sebelius is the Secretary of HHS; Defendant Thomas E. Perez is Secretary of the DOL; and Defendant Jacob J. Lew is Secretary of the DOT. (*Id.* 32-36.)

On September 24, 2013, Plaintiffs filed the instant action, which brings the following causes of action: (1) Violation of the Religious Freedom Restoration Act; (2) Violation of the First Amendment—Free Exercise Clause, Substantial Burden; (3) Violation of the First Amendment—Free Exercise Clause, Intentional Discrimination; (4) Violation of the First Amendment—Free Exercise and Establishments Clauses, Discrimination Among Religions; (5) Violation of the First Amendment—Establishment Clause, Selective Burden/Denominational Preference

(*Larson v. Valente*); (6) Interference in Matters of Internal Religious Governance—Free Exercise and Establishment Clauses; (7) Violation of the First and Fifth Amendments—Establishment Clause and Due Process, Religious Discrimination; (8) Violation of the Fifth Amendment—Due Process and Equal Protection; (9) Violation of the First Amendment—Freedom of Speech; (10) Violation of the First Amendment—Freedom of Speech, Expressive Association; (11) Violation of the First Amendment—Free Exercise Clause and Freedom of Speech, Unbridled Discretion; (12) Violation of the Administrative Procedure Act—Lack of Good Cause and Improper Delegation; (13) Administrative Procedure Act—Arbitrary and Capricious Action; (14) Administrative Procedure Act—Agency Action without Statutory Authority; (15) Administrative Procedure Act—Agency Action Not in Accordance with the Law, Weldom Amendment/Religious Freedom Restoration Act/First Amendment to the United States Constitution; and (16) Administrative Procedure Act—Agency Action Not in Accordance with the Affordable Care Act. (Compl. pp. 46-61.)

As preliminary relief, Plaintiffs request a preliminary injunction "prohibiting Defendants while this lawsuit is pending from enforcing the Final Mandate against the Plaintiffs . . . and prohibiting Defendants from charging or assessing penalties against the . . . Plaintiffs for failure to offer or facilitate access to contraceptives (including abortifacient contraceptives), sterilization procedures, and related education and counseling." (*Id.* p. 61.) As final relief, Plaintiffs seek a declaration that the Final Mandate violates the Religious Freedom Restoration Act, the First Amendment, the Fifth Amendment, and

the Administrative Procedures Act, and therefore no penalties can be assessed against Plaintiffs for failure to offer or facilitate access to contraceptives, sterilization, or abortifacients. (*Id.* p. 63-4.)

On October 24, 2013, Plaintiffs filed a Motion for Preliminary Injunction asking the Court to grant the preliminary relief sought in their Complaint. (ECF No. 15.) The Court set an abbreviated briefing schedule on the Motion for Preliminary Injunction to permit the Court the opportunity to address the issues by January 1, 2014, the date by which Plaintiffs must comply with the Mandate. (ECF No. 18.) Defendants filed their response on November 8, 2013 (ECF No. 29), and Plaintiffs filed their reply on November 15, 2013 (ECF No. 37). Thus, Plaintiff's Motion for Preliminary Injunction is ripe for review. No party requested a hearing on the Motion for Preliminary Injunction[1], and the Court finds that a hearing is not necessary to resolve the issues raised therein.

Contemporaneous with their Response to the Motion for Preliminary Injunction, Defendants filed a

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[1] Plaintiffs' Complaint states that they "respectfully request that the Court set a hearing on this request for a preliminary injunction at the earliest possible time and, after hearing, grant Plaintiffs' request for preliminary injunction." (Compl. 336.) However, this request, buried in the middle of a sixty-five page Complaint violates WJM Revised Practice Standard III.B., which requires that "[a]ll requests for the Court to take any action, make any type of ruling, or provide any type of relief must be contained in a separate, written motion. A request of this nature contained within a brief, notice, status report or other written filing does not fulfill this Practice Standard." Plaintiffs' actual Motion for Preliminary Injunction (ECF No. 15) does not request a hearing.

Motion to Dismiss or, in the alternative, for Summary Judgment. (ECF No. 30.) The Motion to Dismiss contends that Plaintiffs lack standing to bring this action, and also moves to dismiss or for summary judgment on all of the substantive claims. (*Id.*) Because the Court must ordinarily address issues such as standing before ruling on the merits of an action, the Court ordered an abbreviated briefing scheduled on the Motion to Dismiss. (ECF No. 33.) Plaintiffs filed their response on November 22, 2013 (ECF No. 42), and Defendants filed their reply on November 27,2013 (ECF No. 44.) Thus, Defendants' Motion to Dismiss is ripe for review.[2]

II. STANDING

Defendants move to dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the Court lacks subject matter jurisdiction because Plaintiffs have failed to demonstrate that they will suffer an injury in fact.[3]

5. LEGAL STANDARD

Rule 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject

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[2] Plaintiffs have filed a Rule 56(d) Motion arguing that, if the Court construes Defendants' Motion as one for summary judgment, Plaintiffs should be permitted to conduct discovery before the Court makes any substantive ruling. (ECF No. 41.) Because the Court only considers the standing argument in this Order, and rules in Plaintiffs' favor, the Court need not address Plaintiffs' Rule 56(d) Motion at this time.

[3] In the interest of addressing Plaintiffs' Motion for Preliminary Injunction before the regulations take effect on January 1, 2014, this standing argument is the only portion of Defendants' Motion to Dismiss that will be addressed in this Order.

matter." Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case. Rather, it calls for a determination that the court lacks authority to adjudicate the matter, attacking the existence of jurisdiction rather than the allegations of the complaint. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *See id.*

A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). When considering a Rule12(b)(1) motion, however, the court may consider matters outside the pleadings without transforming the motion into one for summary judgment. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Where a party challenges the facts upon which subject matter jurisdiction depends, a district court may not presume the truthfulness of the complaint's "factual allegations . . . [and] has wide discretion to allow affidavits, other documents, and [may even hold] a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id.*

6. ANALYSIS

Article III of the United States Constitution limits the jurisdiction of federal courts to "[c]ases" and

"[c]ontrovers[ies]." U.S. Const. art. III, § 2. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also Allen v. Wright*, 468 U.S. 737, 750 (1984) (holding that standing "is perhaps the most important of the [Article III] doctrines"). "The gist of the question of standing" is whether the plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

"[T]he irreducible constitutional minimum of standing contains three elements": (1) the plaintiff must have suffered a "concrete and particularized" injury that is "actual or imminent" (*i.e.*, an "injury in fact"); (2) there must be "a causal connection between the injury and the conduct complained of,"; and (3) it must be "likely . . . that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61 (quotation marks omitted); *see also Allen*, 468 U.S. at 751 ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

In evaluating a plaintiff's standing at the motion

to dismiss stage, a court may consider not only the allegations in the complaint, but also factual averments made by declaration or affidavit. In *Warth v. Seldin*, the United States Supreme Court stated,

> [In] ruling on a motion to dismiss for want of standing, [courts] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint *or by affidavits*, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from *all materials of record*, the complaint must be dismissed.

422 U.S. at 501-02 (emphasis added). Subsequent decisions by the Supreme Court and lower courts have reinforced this rule. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay*, 484 U.S. 49, 65 (1987) ("[A] suit will not be dismissed for lack of standing if there are sufficient allegations of fact—not proof—in the complaint *or supporting affidavits*.") (emphasis added) (internal quotations omitted); *Sac & Fox Nation of Mo. v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000) ("The Tribes' uncontroverted affidavits, albeit conclusory, support their allegations of injury. . . . [A] plaintiff may submit affidavits to particularize allegations of fact in support of its standing.").

In this case, Defendants argue that Plaintiffs have failed to meet their burden on the "injury in fact" prong of the standing analysis. (ECF No. 30 at 11-12.) Plaintiffs contend that they have standing "based on

the simple fact that compliance with the rules will require an expenditure of time and money." (ECF No. 42 at 27.) The Tenth Circuit has held that "out-of-pocket cost to a business of obeying a new rule of government" is sufficient to constitute an injury in fact. *Nat'l Collegiate Athletic Ass'n v. Califano*, 622 F.2d 1382, 1386 (10th Cir. 1980); *see also Hydro Res. Inc. v. EPA*, 608 F.3d 1131, 1144-45 (10th Cir. 2010) (business costs of undertaking permitting process are injury in fact). The cost need not be large; all that is required is some concrete and particularized injury. *See, e.g., Cressman v. Thompson*, 719 F.3d 1139, 1145 (10th Cir. 2013) (cost of $16.50 for specialized license plate was a "concrete, actual monetary injury" which established an injury in fact).

The self-certification form created by Defendants in accordance with the Final Rules states that it will take an average of fifty minutes for an employer to fill out the required information. (ECF No. 37-3.) The basis for this statement comes from the Administrative Record, which provides that "an organization will need approximately 50 minutes (30 minutes of clerical labor at a cost of $30.64 per hour, 10 minutes for a manager at a cost of $55.22 per hour, 5 minutes for legal counsel at a cost of $83.10 per hour, and 5 minutes for a senior executive at a cost of $112.43 per hour) to execute the self-certification." 78 Fed. Reg. 39,890. "[T]he total annual burden for preparing and providing the information in the self-certification is estimated to be approximately $41 for each eligible organization." *Id.*

Additionally, with regard to the burden imposed on any third party administrator that receives a self-certification form, the Administrative Record states

that: "It isestimated that each issuer or third party administrator will need approximately 1 hour of clerical labor (at $31.64 per hour) and 15 minutes of management review (at $55.22 per hour) to prepare the notices for a total cost of approximately $44." 78 Fed. Reg. 39,890. As the third party administrator for the Little Sisters and the Trust, Christian Brothers Services is likely to incur this cost upon receipt of these entities' self-certification forms.

Defendants insist that, to avoid incurring substantial fines, Little Sisters and the Trust will be required to complete the self-certification forms and deliver these forms to Christian Brothers Services. (ECF No. 44 at 10-11.) In fact, the Defendants base the standing portion of their Motion to Dismiss on the fact that execution of the form is all that is required of Plaintiffs, and that this is not sufficient injury for purposes of standing. (*Id.*) However, Defendants utterly fail to address the real, actual costs that Plaintiffs will incur by completing and processing the self-certification forms. (*Id.*) The Court finds that Plaintiffs will incur the costs set forth above, and that these costs constitute aninjury in fact for purposes of standing. *See Califano*, 622 F.2d at 1386. Therefore, Defendants' Motion to Dismiss is denied to the extent that it seeks dismissal of this action based on lack of standing.

III. INJUNCTIVE RELIEF

Plaintiffs ask the Court to enter an injunction that "prohibit[s] Defendants from enforcing the Mandate against Plaintiffs and class members, including their third party administrators, and from charging or assessing penalties against them for failure to offer or facilitate access to contraceptives." (ECF No. 15 at

16.)

"A party seeking a preliminary injunction must prove that *all four* of the equitable factors weigh in its favor: specifically, prove that '(1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.'" *Sierra Club v. Bostick*, F. App'x, 2013 WL 5539633, *2 (10th Cir. Oct. 9, 2013) (emphasis in original) (quoting *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). "[C]ourts have consistently noted that 'because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for issuance of an injunction will be considered.'" *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (quoting *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 907 (2d Cir. 1990)). Because, as set forth below, the Court finds that Plaintiffs have failed to show that they will suffer an irreparable injury if the proposed injunction is not granted, the Court's analysis begins and ends with this prong.

Plaintiffs contend that they have satisfied the irreparable harm prong because they have shown that the Final Rules likely violate the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(a). (ECF No. 15 at 13.) The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby Stores, Inc. v.*

Sebelius, 723 F.3d 1114, 1146 (10th Cir. 2013). Thus, to determine whether Plaintiffs have shown an irreparable harm sufficient to warrant injunctive relief, the Court must examine whether Plaintiffs have shown that they are likely to suffer a RFRA violation in the absence of an injunction.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). To prevail on their RFRA claim, Plaintiffs must show that they wish "to engage in (1) a religious exercise (2) motivated by a sincerely held belief, which exercise (3) is subject to a substantial burden imposed by the government." *See Abdulhaseeb v. Calbone*,[4] 600 F.3d 1301, 1312-13 (10th Cir. 2010). Thus, in evaluating Plaintiffs' RFRA claim, the Court must first identify the religious belief, then determine whether such belief is sincere, and finally decide whether the government has placed "substantial pressure on the religious believer." *Hobby Lobby*, 723 F.3d at 1140.

As set forth below, the parties here do not dispute Plaintiffs' sincere religious beliefs and, therefore, only the third prong of the RFRA claim merits significant discussion. Plaintiffs contend that the Court's analysis of whether the Final Rules "substantially burden" their religious beliefs is governed by the Tenth Circuit's recent decision in *Hobby Lobby*. (ECF

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[4] The Court recognizes that *Abdulhaseeb* involved the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) ("RLUIPA"), which is a different statute than RFRA. However, the Tenth Circuit has applied the same legal standard to both RFRA and RLUIPA, and *Abdulhaseeb* was heavily relied upon by the Tenth Circuit in *Hobby Lobby*, which is a RFRA case. *See Hobby Lobby*, 723 F.3d at 1140.

No. 37 at 6.) The Court agrees that Plaintiffs in this case share many of the same religious beliefs with the *Hobby Lobby* plaintiffs, at least the beliefs of the individual plaintiffs in that case. However, as Defendants point out, Hobby Lobby operates on a "for-profit" basis, and is therefore neither a religious employer nor an eligible organization under the Final Rules. *See Hobby Lobby*, 723 F.3d at 1140. Thus, the Mandate required the *Hobby Lobby* plaintiffs to either provide contraceptive coverage for their employees, or face fines ranging between $26 million and $475 million dollars. *Id.* This "Hobson's choice" was sufficient to establish a substantial burden on their religious beliefs. *Id.*

In this case, it is undisputed that Plaintiffs qualify as "eligible organizations" under the Final Rules. Plaintiffs are not similarly situated to the *Hobby Lobby* plaintiffs because Little Sisters and the Trust can avoid the fines levied upon non-compliance with the Mandate by signing the self-certification form and providing it to Christian Brothers Services, their third party administrator. The *Hobby Lobby* court had no occasion to consider the accommodation for "eligible organizations" in the Final Rules or to decide whether such accommodation violates RFRA. Thus, while *Hobby Lobby* is instructive on a number of issues in this case, it is not dispositive of the issue of whether, under the specific facts of this case, the Final Rules substantially burden these Plaintiffs' religious beliefs. The Court must therefore look at this issue anew.

In support of the Motion, Little Sisters has submitted multiple affidavits from Mother Loraine Marie Claire Maguire, the Provincial Superior of the Province of Baltimore for the Little Sisters of the Poor

("Mother Maguire") (ECF Nos. 15-1 & 37-1) and Brother Michael Quirk, President of Plaintiff Christian Brothers Services ("Brother Quirk") (ECF Nos. 15-2 & 37-2). Mother Maguire attests that Little Sisters follows Catholic religious teachings which affirm that life begins at conception, and that abortion and post-conception contraception are "gravely contrary to moral law". (Maguire Decl. (ECF No. 15-1) 29-32 (quoting Sections 2270 and 2271 of the Catechism of the Catholic Church (1994)).) She states that church doctrine teaches that contraception and sterilization are "intrinsic evils", and that "programs of 'economic assistance aimed at financing campaigns of sterilization and contraception' are 'affronts to the dignity of the person and the family.'" (*Id.* 33-34 (quoting Section 234 of the Compendium of the Social Doctrine of the Church (2004).) Citing Section 91 of the *Evangulium Vitae*, Mother Maguire attests that "Catholics may never 'encourage' the use of 'contraception, sterilization, and abortion.'" (*Id.* 35.) She relates that directives issued by the United States Conference of Catholic Bishops "prohibit providing, promoting, or condoning abortions, abortion-inducing drugs, contraceptives, and sterilization", and specifically warn against partnering with other entities in a manner that would involve the provision of such "intrinsically immoral" services. (*Id.* 36.) Brother Quirk's declarations echo these beliefs. (Quirk Decl. (ECF No. 15-2) 15-26.)

Little Sisters and the Trust contend that the Final Rules burden their religious beliefs by requiring that they:

- "participate in the provision of insurance coverage" or "provide health benefits to [their]

employees" that include access to contraception, abortion, and sterilization; (Maguire Decl. ¶¶ 45-47; *see also* Quirk Decl. ¶ 31.)

- "designate any third party" or "make" or "facilitate" the "government-required certifications to a third party" that require the third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and device; (Maguire Decl. ¶¶ 48-49; *see also* Quirk Decl. ¶¶ 32-33.)
- "authorize anyone to arrange or make payments for contraceptives, sterilization, and abortifacients; take action that triggers the provision of contraceptive, sterilization, and abortifacients; or is the but-for cause of the provision of contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. (ECF No. 37-1) ¶ 9; *see also* Quirk Supp. Decl. (ECF No. 37-2) ¶ 8.)
- "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries now." (Maguire Supp. Decl. ¶ 9(A); *see also* Quirk Supp. Decl. ¶ 8.)
- "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver those contraceptives, sterilization, and abortifacients to the Little Sisters' employees and beneficiaries, now or in the future." (Maguire Supp. Decl. ¶ 9(B); *see also* Quirk Supp. Decl. ¶ 8.)

- "[c]reate a provider-insured relationship (between the Little Sisters and Christian Brothers Services or any other third-party administrator), the sole purpose ofwhich would be to provide contraceptives, sterilization, and abortifacients." (Maguire Supp. Decl. ¶ 9(D); *see also* Quirk Supp. Decl. ¶ 8.)
- "[p]articipate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees and other beneficiaries." (Maguire Suppl. Decl. ¶ 9(E); *see also* Quirk Supp. Decl. ¶ 8.)

Additionally, Christian Brothers Services contends that its religious beliefs are violated if it is required to "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. 8.)

Defendants do not dispute that Plaintiffs hold the religious beliefs set forth above and that such beliefs are sincere. (ECF No. 29 at 8-9.) Rather, Defendants take issue with Plaintiffs' interpretation of how these religious beliefs will be impacted by the Mandate and the Final Rules. (*Id.*) Specifically, Defendants contend that "[t]he Little Sisters Plaintiffs are eligible for the accommodation, and thus, they need not contract, arrange, pay, or refer for contraceptive coverage." (*Id.* at 8.) Additionally, Defendants argue that, because Little Sisters participates in a self-funded "church plan", execution of the self-certification form does not trigger, facilitate, or provide access to care that would violate Plaintiffs' religious beliefs. (*Id.* at 8-9.)

In response, Plaintiffs argue that the Court cannot question Mother Maguire's and Brother Quirk's affirmations regarding the impact that compliance with the Final Rules would have on their religious beliefs. (ECF No. 37 at 6.) It is well-settled that "it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes 'too much' moral disapproval on those only 'indirectly' assisting wrongful conduct." *Hobby Lobby*, 723 F.3d at 1153-54; *see also Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013) (holding "[n]o civil authority can decide" whether providing contraceptive coverage impermissibly assists the commission of a wrongful act under the moral doctrines of the Catholic Church).

Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations. Statutory and regulatory interpretation is a question of law, and is a joint effort of the courts and the government agency charged with administering a law. *See Negusie v. Holder*, 555 U.S. 511, 531 (2009). Thus, it is true that this Court cannot question whether a particular act or conduct, allegedly caused by a challenged regulation, violates a party's religious belief. This Court can, however, most certainly analyze the challenged regulations to determine whether their implementation will cause the allegedly harmful act to in fact occur. *See O'Brien v. Health and Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) (looking past plaintiff's contentions about how their religious beliefs would be

affected by the challenged regulations and interpreting the regulations to discern what demands were placed on plaintiff). Accordingly, in the discussion below, the Court will examine each of the ways in which Plaintiffs contend their religious beliefs are substantially burdened by the Final Rules.

A. DIRECT PROVISION OF COVERAGE FOR CONTRACEPTIVE CARE

Mother Maguire states that, based on Little Sisters' religious beliefs, they cannot not participate in the provision of insurance coverage for contraception, abortion and sterilization, and cannot provide health benefits that will include access to these services. (ECF No. 15-1 45-47.) Brother Quirk echoes this statement on behalf of the Trust. (ECF No. 15-2 31.) The Court accepts these religious beliefs as sincere, but does not find that the challenged regulatory scheme will substantially burden these beliefs.

Under the "eligible organizations" accommodation in the Final Rules, once Little Sisters and the Trust complete the self-certification form and deliver it to their third party administrator, they have satisfied the Mandate's requirements, and have no further obligations under the Mandate. 26 C.F.R. § 54.9815-2713A (stating that a self-insured group health plan complies with Mandate by contracting with a third party administrator and providing the third party administrator with the self-certification form). Thus, by their very terms, the regulations do not require Little Sisters or the Trust to participate in the provision of contraceptive coverage or provide health benefits that include contraceptive coverage.

Christian Brothers Services contends that it cannot "act as a 'third party administrator' under the Mandate because it would have to contract for, arrange for or otherwise facilitate the provision of abortifacients, sterilizations and contraception in violation of Catholic teachings." (Quirk Supp. Decl. 8.) However, Defendants' purported basis for the requirement that third party administrators for eligible organizations provide separate payments for contraceptive services arises from ERISA. *See* 78 Fed. Reg. 39,879-80. It is undisputed that the Trust is a self-insured "church"plan under 26 U.S.C. § 414(e), and as a consequence is not subject to ERISA, because it has not made an election under 26 U.S.C. § 410(d). (ECF No. 15-2 8-10.) Because the Trust is not subject to ERISA, Defendants candidly admit that they lack the regulatory authority to require Christian Brothers Services, as the third party administrator for Little Sisters and the Trust, to administer or pay for contraceptive care. (ECF No. 40 at 10-12 (citing 29 U.S.C. § 1003(b)(2) (exempting "church plans" from ERISA).) Thus, the Final Rules do not in fact require Christian Brothers Services to contract, arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients.

Because the Final Rules do not require any of the Plaintiffs to provide, participate in, contract or arrange for, or otherwise facilitate the provision of contraceptives, sterilization, or abortifacients, the Court concludes that the Final Rules do not substantially burden Plaintiffs' religious beliefs which forbid such actions.

B. AUTHORIZATION OF THIRD-PARTY TO PROVIDE COVERAGE

Mother Maguire also states that it would violate Little Sisters' religious beliefs to designate or authorize any third party to provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services. (ECF No. 15-1 48; 37-1 9.) She avers that Little Sisters cannot "[c]reate a provider-insured relationship . . . the sole purpose of which would be to provide contraceptives, sterilization, and abortifacients." (ECF No. 37-1 9(D).) Brother Quirk makes the same statements on behalf of the Trust. (ECF No. 15-2 33; ECF No. 37-2 8.) Again, the Court does not question the sincerity of these religious beliefs. However, as set forth below, the Court finds that the Final Rules do not substantially burden such beliefs on this separate basis as well.

To comply with the Mandate (and avoid the significant penalties that come with non-compliance), an "eligible organization" must contract with a third party administrator and provide that third party administrator with the completed self-certification form. *See* 26 C.F.R. § 54.9815-2713A. These are the only two acts required for an eligible organization to comply with the Mandate. *Id.* Under Defendants' interpretation of the regulations, whether this third party administrator is subject to ERISA is irrelevant to whether an eligible organization has complied with the Mandate. (*See* ECF No. 44 at 10-12.)

It is undisputed that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37-1 5.) Christian Brothers Services does not currently provide the Trust's beneficiaries with access

to sterilization, contraception, and abortion-inducing drugs and services, and it does not intend to do so in the future. (ECF No. 15-2 27.) Defendants concede that they have no regulatory authority to require Little Sisters or the Trust to contract with a different third party administrator. (ECF No. 44 at 11.) Thus, the Final Rules do not require Little Sisters or the Trust to designate, authorize, or create a provider-insured relationship with any third party that will provide their employees with access to contraception, sterilization, or abortifacients.

The Court notes that the Final Rules could be construed to require an eligible organization to contract with a third party administrator that is willing to act as an ERISA plan administrator and claim administrator and take on all of the obligations set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A. The Final Rules state that an eligible organization must: (1) "contract[] with one or more third party administrator" and (2) "provide each third party administrator that will process claims for any contraceptive services required to be covered under [the Mandate] with a copy of the self-certification" form. *See* 26 C.F.R. § 54.9815-2713A(b)(i) & (ii). The self-certification form must provide notice that: (1) the eligible organization "will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services"; and (2) the "[o]bligations of the third party administrator are set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A." *Id.* at § 54.9815-2713A(b)(ii)(A) & (B). Reading these provisions together, an eligible organization could conclude that, to comply with the Mandate, it is required to contract with a third party

administrator who is willing to take on the obligations set forth in 29 C.F.R. § 2510.3-16 and 26 C.F.R. § 54.9815-2713A.

However, in this litigation, Defendants have plainly taken the position that, under 26 C.F.R. § 54.9815-2713A, an eligible organization satisfies the Mandate by providing the self-certification form to their third party administrator, irrespective of whether that third party administrator is governed by ERISA, will act as a plan and claims administrator for contraceptive care, or will provide payments for contraceptive services. (ECF No. 44 at 10-12.) As Defendants are the governmental authorities tasked with issuing and enforcing the regulations implementing the ACA (ECF No. 1 31), the Court must defer to their reasonable interpretation of such regulations.[5] *See Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 395 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984)). Defendants' position that an eligible

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[5] Plaintiffs' contention that this interpretation is not entitled to deference because it is just Defendants' litigation position finds no support in the record. Defendants are offering their interpretation of a regulation that has yet to come into effect and, therefore, such interpretation is not a *post hoc* rationalization. Defendants' interpretation is also their first interpretation of these regulations, and does not appear to simply be a convenient litigation position. Therefore, the Court sees no reason that such interpretation should not be entitled to an appropriate level of deference. *See Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871, 880 (2011) (stating that the courts must defer to an agency's interpretation of its own regulation even when "advanced in a legal brief"); *see also Christoper v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 (2012) (listing examples of when an agency's interpretation brought forth during litigation would not be entitled to deference).

organization satisfies the Mandate by providing the self-certification form to its third party administrator, even if that third party administrator is not governed by ERISA, is a reasonable construction of the Final Rules. As such, the Court is bound by this interpretation.

Thus, under Defendants' interpretation of the regulations, to satisfy the Mandate and avoid fines, Little Sisters and the Trust are required only to complete the self-certification form and provide it to their third party administrator. Whether this third party administrator is subject to ERISA or willing to provide their employees with access to contraceptive care is irrelevant to whether they have complied with the Mandate. Accordingly, the Court finds that the challenged regulations do not require Little Sisters or the Trust to designate, authorize, or contract with a third party administrator that will provide their employees with access to sterilization, contraception, and abortion-inducing drugs and services.

C. COMPLETION AND DISTRIBUTION OF THE SELF-CERTIFICATION FORM

Plaintiffs next contend that the requirement that they complete the self-certification form and deliver it to their third party administrator violates their religious beliefs. (ECF No. 37 at 6.)

The self-certification form ("Form") provides that it is "to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-

2713A[6], 29 CFR 2590.715-2713A[7], and 45 CFR 147.131[8]." (ECF No. 37-3 at 1.) An organization completing the Form must list its name, the name and title of the person authorized to make the certification on behalf of the organization, and provide identifying information for the person completing the certification. (*Id.*) The person who signs the Form must "certify that, on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a non-profit entity; and the organization holds itself out as a religious organization." (*Id.*) This person must also attest to the fact that all representations made on the Form are true, correct, and complete, to the best of her knowledge and belief. (*Id.*)

On the back of the Form, there is a notice to

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[6] Part 54 of Title 26 contains regulations related to pension excises taxes implemented by the Internal Revenue Service. As discussed in detail above, 26 CFR 54.9815-2713A defines the entities that qualify as "eligible organizations" and outlines what eligible organizations must do to comply with the Mandate. This regulation does not specifically state that it applies to church plans, but also does not specifically exempt church plans.

[7] This provision is identical to 26 CFR 54.9815-2713A but appears in part 54 of Title 29, which contains regulations related to group health plans implemented by the Employee Benefits Security Administration within the Department of Labor.

[8] This provision defines an "eligible organization" (using the same definition contained in both 26 CFR 54.9815-2713A and 29 CFR 2590.715-2713A) and sets forth how an eligible organization who is insured under a group health plan complies with the Mandate. It does not mention self-insured group health plans or church plans.

third party administrators which states:

> In the case of a group health plan that provides benefits on a self-insured basis, the provision this certification to a third-party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:
>
> (1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.
>
> This certification is an instrument under which the plan is operated.

(ECF No. 37-3 at 2.)

In her Supplemental Declaration, Mother Maguire states that, because of their religious beliefs, Little Sisters cannot "[s]ign the self-certification form that on its face authorizes another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries". (ECF No. 37-1 ¶ 9(A).) The Court finds that this contention reads too much into the language of the Form, which requires only that the individual signing it certify that her organization opposes providing contraceptive coverage and otherwise qualifies as an eligible organization. (ECF No. 37-3 at 1.) The Form contains a notice outlining the duties of third party

administrators that receive the Form, but nothing on the face of the Form expressly authorizes the provision of contraceptive care, particularly with regard to church plans.

Additionally, as applied to the facts of this case, Little Sisters' execution of the Form does not authorize any organization to deliver contraceptive coverage to Little Sisters' employees. The regulations cited in the notice direct the third party administrator to ERISA regulations outlining the obligations of a plan administrator under ERISA. *See* 26 C.F.R. § 54.9815-2713A(b)(ii)(B) ("Obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and 26 CFR 54.9815-2713A."); 29 C.F.R. § 2510.3-16 (an ERISA regulation which states that a third party administrator that receives a copy of a self-certification form from an eligible organization becomes "the plan administrator under section 3(16) of ERISA for any contraceptive services.").

Plaintiffs contend that, on its face, the Form does not make clear that only third party administrators governed by ERISA are responsible for making payments for contraceptive care. (ECF No. 42 at 27-28.) Plaintiffs also contend that the regulations make no exception for third party administrators of church plans. (ECF No. 37-2 12.) However, as Plaintiffs also acknowledge, church plans are categorically exempt from ERISA altogether. (ECF No. 15-2 9.) Given this blanket exemption, it would be unreasonable to require Defendants to specifically exempt church plans each time they promulgate a new regulation under their ERISA authority. Clearly, therefore, given this regulatory framework, the fact that church plans are not specifically exempted from the requirements

levied on third party administrators by the Final Rules does not mean that church plan third party administrators are bound to comply with these regulations.

Mother Maguire and Brother Quirk are aware that the Trust is a self-funded church plan, and that Christian Brothers Services is the third party administrator for the Trust. (ECF No. 37-1 5; ECF No. 15-2 4, 8.) Because a church plan and its third party administrator are not subject to ERISA, if these individuals complete the Form on behalf of their respective organizations, they know that they are not "authoriz[ing] another organization to deliver contraceptives, sterilization, and abortifacients to the Little Sisters' employees and other beneficiaries".

Mother Maguire also states that Little Sisters also cannot "[d]eliver the self-certification form to another organization that could then rely on it as an authorization to deliver these contraceptives, sterilization, and abortifacients to the Little Sisters' employees". (*Id.* 9(B).) However, as discussed above, Little Sisters is not required to deliver the Form to any organization other than its current third party administrator, Christian Brothers Services. The record is clear that Christian Brothers Services has no intention of delivering contraceptive, sterilization, and abortifacients to Little Sisters'employees, and no intention of contracting with another entity that will provide such services. (ECF No. 15-2 27 & 32.) Defendants have explicitly stated that they have no authority to require that Little Sisters and/or Christian Brothers Services contract with a third party provider who is subject to ERISA, or who is willing to provide contraceptive coverage to Little

Sisters' employees. (ECF No. 44 at 10-12.) Thus, Plaintiffs' contention that their religious beliefs are substantially burdened because the Form executed by the Little Sisters' could be relied on by another organization to provide contraceptive services to Little Sisters' employees is pure conjecture, one that ignores the factual and legal realities of this case.[9]

Finally, Mother Maguire contends that it would violate Little Sisters' religious beliefs if they are required to "[p]articipate in a scheme, the sole purpose of which is to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries." (ECF No. 37-1 9(E).) Brother Quirk echoes these thoughts exactly. (ECF No. 37-2 8.) Again, this statement ignores the realities of this case. Christian Brothers Services has plainly stated that it has not and does not intend to facilitate the provision of contraceptives, sterilization, or abortifacients. (ECF No. 37-2 8.) Therefore, if Mother Maguire executes the Form and delivers it to Christian Brothers Services—the only acts required of her under the "scheme" set forth in the Final Rules—Little Sisters' employees will not be provided

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[9] Were Little Sisters required to deliver the completed Form to a major health insurance company, such as Blue Cross Blue Shield or Kaiser Permanente, then the situation would be vastly different, as these insurance companies could rely on the Form as authorization to deliver contraceptive care to Little Sisters' employees. More likely, because these entities are subject to ERISA, they would be required to rely on the Form and act as plan and claims administrator for purposes of contraceptive care. But, because the Trust is a church plan and Defendants lack the authority to require it to contract with an entity subject to ERISA, the Court need not consider these hypotheticals, as they relate to facts not before the Court in this case.

contraceptives, sterilization, or abortifacients through their employer-sponsored health plan. Similarly, if Brother Quirk executes the Form on behalf of the Trust and delivers it to Christian Brothers Services, as he is required to do, no beneficiary of health care through the Trust will be provided contraceptives, sterilization or abortifacients through the employer-sponsored health plan.

The purpose of Little Sisters and the Trust executing and delivering the Form to their third party administrator is not to provide contraceptives, sterilization, and abortifacients to the Little Sisters' plan employees or other beneficiaries. It is clear that these services will not be offered to the employees regardless of whether the Form is executed and delivered to Christian Brothers Services. Instead, on the facts of this case, the "sole purpose" of the execution and delivery of the Form is to comply with the Mandate and avoid the substantial penalties for non-compliance.

Accordingly, on the facts of this case, the Court finds it will not substantially burden Plaintiffs' religious beliefs for an authorized representative of these organizations to execute the self-certification form and deliver it to their third party administrator. Nor are Plaintiffs being required to buy into a scheme that substantially burdens their religious beliefs.

D. IRREPARABLE HARM CONCLUSION

To satisfy their burden of showing irreparable harm, the only argument Plaintiffs make is that a RFRA violation is always irreparable harm. (ECF No. 15 at 16.) As set forth in detail above, the Court finds that Plaintiffs have not demonstrated a likely RFRA

violation. While the Court does not question the sincerity of Plaintiffs' beliefs, the Court finds that the Final Rules will not function in a manner that substantially burden these beliefs. Because Little Sisters' employees receive their health care coverage through the Trust, which is a self-insured church plan with a Catholic third party administrator, these employees will not be provided access to contraception, sterilization, or abortifacients through this health plan. Defendants have freely admitted that they lack the regulatory authority at this time to force a different result.

Plaintiffs repeatedly emphasize that the Defendants have only conceded that they lack the authority "at this time" to require third party administrators of church plans to administer claims for contraceptive services. (*See* ECF No. 15-2 4.) The Court acknowledges that the regulations implementing the ACA are in flux, and that Congress may, at some point in the future, grant Defendants some authority outside of ERISA to enforce the Mandate, and/or promulgate new regulations that apply to church plans. Indeed, there is a story on the news almost daily about changes being made to the ACA regulations. However, the Court cannot and will not hypothesize or speculate about how such future changes may impact Plaintiffs.

"To constitute irreparable harm, an injury must be certain, great, actual 'and not theoretical.'" *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)); *see also Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) ("Injunction issues to prevent existing or presently threatened

injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."). "[T]he party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001). *Id.*

The Court finds that Plaintiffs have failed to meet this burden. Plaintiffs ignore the fact that, as participants in a church plan, they fall outside of Defendants' current enforcement authority. Plaintiffs would have the Court surmise that their self-certification form could be relied on by a hypothetical third party administrator to facilitate the provision of contraception, sterilization, and abortifacients to their employees at some point in the future. However, the Court is tasked with determining only whether the regulations, as they currently stand, substantially burden Plaintiffs'religious beliefs. Given the current version of the regulations, as applied to the facts of and parties to this case, the Court finds that Plaintiffs have failed to show that any injunction is necessary to prevent an imminent harm.

IV. CONCLUSION

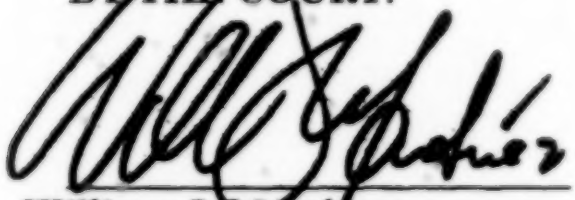
It is well settled that a preliminary injunction is an extraordinary remedy, and that it should not be issued unless the movant's right to relief is "clear and unequivocal." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001). For the reasons set forth above, the Court finds that Plaintiffs have failed to show a clear and unequivocal right to injunctive relief. As such, the Court ORDERS as follows:

1. Plaintiffs' Motion for Preliminary Injunction (ECF No. 15) is DENIED;

2. Defendants' Motion to Dismiss, or in the alternative, for Summary Judgment (ECF No. 30) is DENIED to the extent it seeks dismissal of this case for lack of standing. The Court RESERVES RULING on the remainder of the issues raised in the Motion to Dismiss.

Dated this 27th day of December, 2013.

BY THE COURT:



William J. Martínez
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

REACHING SOULS INTERNATIONAL, INC., *et al.*
PLAINTIFFS,

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*
DEFENDANTS

Case No. CIV-13-1092-D

MEMORANDUM DECISION AND ORDER

Before the Court are Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] and Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51]. Plaintiffs' Motion seeks relief pursuant to Fed. R. Civ. P. 65(a) from federal regulations implementing the Affordable Care Act ("ACA")[1] that provide a mechanism for

[1] The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

certain religious employers to avoid the mandate to include contraceptive services in group health plan coverage, by executing a required self-certification form. This mechanism – referred to as the "accommodation" – is now codified in 26 C.F.R. § 54.9815-2713A, 29 C.F.R. § 2590.715-2713A, and 45 C.F.R. § 147.131. Defendants' Motion seeks dismissal of the action pursuant to Fed. R. Civ. P. 12(b)(1) on the ground that Plaintiffs lack constitutional standing to challenge the accommodation. The Motions, which are fully briefed and at issue, were the subject of a hearing held December 16, 2013.[2]

BACKGROUND

Plaintiffs Reaching Souls International, Inc. and Truett-McConnell College, Inc. are nonprofit religious organizations that provide benefits to employees through a group health plan sponsored by Plaintiff GuideStone Financial Resources of the Southern Baptist Convention ("GuideStone"). The plan provides group health benefits on a self-insured basis for organizations associated with the Southern Baptist Convention, which share its religious views regarding abortion and contraception, and rely on GuideStone to provide coverage consistent with those views. Defendants are federal agencies and officials responsible for promulgating ACA's implementing

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[2] The purposes of the hearing were to receive any relevant evidentiary materials and to hear oral arguments. The parties elected not to present evidence but, instead, relied on written materials submitted with their briefs, except Plaintiffs provided copies of certain regulations and EBSA Form 700.

regulations.[3] During the rule-making process, the accommodation was adopted as a means for nonexempt religious organizations that provide employee health benefits and have religious objections to some contraceptive methods, to comply with ACA's mandate of contraceptive coverage as a preventive care service for women. *See* 42 U.S.C. § 300gg-13. Plaintiffs' Complaint asserts numerous statutory and constitutional challenges to the accommodation. The primary focus of Plaintiffs' Motion and supporting arguments, however, are the Religious Freedom Restoration Act of 1993 as amended, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), and the Tenth Circuit's decision in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir.), *cert. granted*, 82 U.S.L.W. 3139 (2013). Also, Plaintiffs seek injunctive relief broad enough to protect a putative class of similarly situated employers, as defined in their Complaint. *See* Compl. [Doc. No. 1], 18.[4]

Defendants deny this case is controlled by *Hobby Lobby*, which concerned the contraceptive-coverage mandate rather than the accommodation. Defendants concede, however, that this Court is bound by the Tenth Circuit's decision of certain issues and must find

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[3] Defendants are: Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services; Thomas E. Perez, Secretary of the United States Department of Labor; United States Department of Labor; Jacob J. Lew, Secretary of the United States Department of the Treasury; and United States Department of the Treasury.

[4] Alternatively, Plaintiffs have filed a Motion for Class Certification [Doc. No. 8] to obtain class-wide relief from enforcement of the contraceptive mandate against similarly situated, nonexempt religious organizations.

in Plaintiffs' favor on parts of the preliminary injunction analysis. Also, if Plaintiffs' Motion is granted, Defendants "do not object to the scope of the resulting preliminary injunction including the named plaintiffs as well as any members of the class plaintiffs have proposed in their complaint." *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 40. The focus of Defendants' Motion, and their opposition to Plaintiffs' Motion for Preliminary Injunction, is a contention that the accommodation will not result in actual injury to Plaintiffs (as required for standing) or substantially burden their religious beliefs (as required to succeed under RFRA). Defendants do not question the sincerity of Plaintiffs' stated beliefs, but Defendants instead argue that any burden on those beliefs is either illusory, speculative, or *de minimis*, for reasons explained *infra*.

FINDINGS OF FACT

Many facts relevant to the Court's analysis of the Motions are undisputed. Because the allegations of the Complaint and statements in affidavits regarding Plaintiffs' organizational structure, religious character, and religious beliefs are unchallenged, they are accepted as true for present purposes.

The Southern Baptist Convention is an association of Christian churches that share common religious beliefs, including support for the sanctity of human life from conception to natural death, and opposition to abortion and abortion-inducing drugs. GuideStone is a nonprofit corporation formed and controlled by the Southern Baptist Convention; it is a tax-exempt church benefits board that assists churches and other religious organizations by facilitating retirement plan

services, health benefits coverage, risk management, and other benefit programs. GuideStone established the GuideStone Plan as a multiple-employer, self-insured health plan that qualifies as a "church plan" and thus is not subject to ERISA.[5] Consistent with the religious convictions of the Southern Baptist Convention, the GuideStone Plan does not cover expenses associated with the elective termination of a pregnancy, including contraceptive drugs or devices considered to be abortifacients. GuideStone has agreements with two corporations, one of which is Highmark Health Services, to provide claims administration services.

Reaching Souls International, Inc. ("Reaching Souls") is a nonprofit corporation founded by a Southern Baptist minister for an evangelical purpose. Its principal officers are Southern Baptist ministers and its faith-based ministry includes training and support for missionaries in Africa, India, and Cuba and an orphan-care program. Truett-McConnell College, Inc. ("Truett-McConnell") is a nonprofit corporation owned by the Georgia Baptist Convention that operates a private, Christian liberal arts college. Both organizations have adopted the GuideStone Plan as a means to provide comprehensive health care benefits for their employees. Reaching Souls has approximately 10 full-time employees; Truett-McConnell has approximately 80 full-time employees. Neither organization qualifies for ACA's "religious employer" exemption, *see* 45 C.F.R. §§ 147.130(a)(1)(iv)(B), 147.131(a); and the GuideStone

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[5] The Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq*. The definition of "church plan" appears at § 1002(33); the exemption appears at § 1003(b)(2).

Plan does not qualify for ACA's "grandfathered" health plan exemption, *see* 26 C.F.R. § 54.9815-1251T.

Although the parties disagree whether the contraceptive drugs to be covered under ACA's mandate are abortifacients, it is undisputed that Plaintiffs oppose providing coverage for the same contraceptive methods at issue in *Hobby Lobby*, 723 F.3d at 1123, 1125, on account of religious objections. Thus, under the challenged regulations, Reaching Souls, Truett-McConnell, and other similarly-situated employers would qualify as an "eligible organization" for the accommodation if they execute the required self-certification form and provide it to a third party administrator ("TPA") for the GuideStone Plan. *See* 26 C.F.R. § 54.9815-2713A(a)-(b); 29 C.F.R. § 2590.715-2713A(a)-(b); 45 C.F.R. § 147.131(b). Under the accommodation process contemplated by the regulations, a TPA receiving notice of self-certification would provide or arrange payments for mandated contraceptive services (including those objected to by Plaintiffs), and could seek reimbursement for the covered services plus an additional "allowance for administrative costs and margin" of at least 10 percent of total payments. *See* 45 C.F.R. § 156.50(d)(3)(ii). The TPA would also provide notice to plan participants and beneficiaries of the availability of contraceptive coverage, without cost sharing. *See* 26 C.F.R. § 54.9815-2173A(d); 29 C.F.R. § 2590.715-2173A(d).

Reaching Souls, Truett-McConnell, and other employers who have adopted the GuideStone Plan face a deadline of January 1, 2014, to elect among four alternatives: 1) discontinue participation in the GuideStone Plan and secure alternative coverage

that complies with ACA's contraceptive mandate; 2) violate the mandate and incur penalties of $100 per day for each affected individual, *see* 26 U.S.C. § 4980D(b)(1); 3) discontinue all health plan coverage for employees;[6] or 4) self-certify that the organization qualifies for the accommodation. Similarly, GuideStone must decide by December 31, 2013, whether to: 1) do nothing and expose nonexempt employers to ACA penalties for failing to provide contraceptive coverage under the GuideStone Plan, unless the employers discontinue participation in the plan; 2) assist eligible organizations with the accommodation process; or 3) discontinue coverage under the GuideStone Plan for organizations that do not satisfy ACA's "religious employer" exemption. It is undisputed that complying with the mandate, incurring penalties for noncompliance, or discontinuing coverage would cause actual injury to Plaintiffs and substantially burden their religious beliefs. The questions presented – for purposes of standing and success under RFRA – involve only the impact of the accommodation on eligible organizations that participate in the GuideStone Plan.

All Plaintiffs have presented statements regarding their religious beliefs that reflect religious objections to participating in the accommodation process. Plaintiffs believe that executing the self-certification form, or

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[6] All Plaintiffs state that their religious beliefs require them to provide health care coverage for employees, as a matter of value and respect for employees and commitment to the well-being of employees and their families. Cancellation of health coverage would also subject a "large employer" like Truett- McConnell to an annual penalty of $2,000 per full-time employee. *See* 26 U.S.C. § 4980H(a), (c)(1)-(2).

otherwise assisting in the implementation of ACA's contraceptive mandate, would cause them to facilitate contraceptive coverage and would violate sincere religious principles.

MOTION TO DISMISS

A. Standard of Decision

Standing to sue is a jurisdictional issue properly raised by a Rule 12(b)(1) motion. *See Wilderness Society v. Kane County*, 632 F.3d 1162, 1168 (10th Cir. 2011) (en banc); *see also Colorado Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). Defendants' Motion also raises a factual attack on jurisdiction, that is, Defendants "go beyond the allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1303 (10th Cir. 2001) (internal quotation omitted). Defendants contend the injury alleged in the Complaint – requiring Plaintiffs to trigger or facilitate coverage for contraceptive services – does not actually exist and "there is absolutely no connection between plaintiffs and contraceptive coverage" under the accommodation. *See* Defs.' Mot. Dism. [Doc. No. 51] at 18.

"In addressing a factual attack, the court does not presume the truthfulness of the complaint's factual allegations, but has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *see E.F.W.*, 264 F.3d at 1303 (internal quotation omitted). In the context of this case, however, there are no disputed jurisdictional facts. As discussed *infra*, Defendants' Motion is

based on a contention that the challenged regulations do not have the legal effect alleged by Plaintiffs and, even if Plaintiffs could establish their factual allegations, they cannot show an injury that would establish standing. Therefore, Defendants' Motion may properly be resolved under Rule 12(b)(1).[7]

B. Plaintiffs' Standing

Defendants' Motion challenges Plaintiffs' Article III standing. To overcome the Motion, Plaintiffs "must show an injury that is '[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling.'" *Hobby Lobby*, 723 F.3d at 1126 (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)) (internal quotation omitted). The first element requires that Plaintiffs "must have suffered an 'injury in fact' – an invasion of a legally protected interest." *See Lujan v. Defenders of Wildlife*, 504 U.S.

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[7] Under the law of this circuit, a Rule 12(b)(1) motion that raises a factual attack on subject matter jurisdiction must be converted to a Rule 56 motion for summary judgment "when resolution of the jurisdictional question is intertwined with the merits of the case." *See Pringle v. United States*, 208 F.3d 1220, 1222 (10th Cir. 2000); *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995); *see also Los Alamos Study Group v. United States Dep't of Energy*, 692 F.3d 1057, 1063-64 (10the Cir. 1012). In this case, however, Defendants maintain that the jurisdictional issue of standing may be resolved "on the pleadings, documents incorporated by reference into the complaint, and judicially noticeable matters – all of which the Court may consider in reviewing defendants' motion to dismiss." *See* Defs.' Reply Supp. Mot. Dism. [Doc. No. 59] at 2-3. Thus, the Court finds no need to treat Defendants' Motion as a summary judgment motion. Further, any factual disputes are not germane to the Court's jurisdictional analysis, discussed *infra*.

555, 560 (1992).

The asserted injury in this case flows from the accommodation's requirement that eligible religious organizations, like Reaching Souls and Truett-McDonnell, must execute the self-certification form and initiate a process by which contraceptive services that they oppose on religious grounds may be provided free of charge to female employees and dependents who are health plan beneficiaries. Defendants' position in this case is that a TPA of a church plan, like the GuideStone Plan, is not required to cover contraceptive services because ERISA provides the only implementing or enforcement authority for the accommodation, and church plans are not subject to ERISA. Defendants thus argue that the accommodation regulations do not apply to the GuideStone Plan as a matter of law, and Plaintiffs' (or a TPA's) mistaken legal view that the regulations do apply cannot create an actual or imminent injury. Defendants' litigation position in this case has been taken in only one other case for which a written decision is available, *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542, 2013 WL 6579764, *6 (E.D.N.Y Dec. 16, 2013) (to be published), and was first asserted on October 31, 2013. *See* Defs.' Resp. Pls.' Mot. Accelerated Briefing Sched. [Doc. No. 19] at 2-3 n.1. Upon consideration, the Court is not persuaded that Defendants' position deprives Plaintiffs of standing.

Plaintiffs' religious beliefs – the sincerity of which is unchallenged – prevent them from participating in a regulatory process designed to provide health care coverage that they oppose on religious grounds, even if the extent of their participation is taking the first

step required by the regulations and permitting the remaining process to play out through other actors. By signing the form, an eligible organization self-certifies that it qualifies for the accommodation and, thus, that its employees and their dependents qualify for contraceptive coverage outside of their health plan. After signing the self-certification form, Plaintiffs must provide it to a TPA for the GuideStone Plan in order to satisfy ACA's contraceptive mandate through the accommodation process formulated by Defendants to extend contraceptive coverage to employees of nonexempt religious organizations. The self-certification form itself notifies a TPA of the obligations set forth in federal regulations regarding the accommodation. These obligations include providing written notice to health plan participants and beneficiaries of the availability of contraceptive coverage without cost sharing. Regardless whether the notice actually results in the provision of contraceptive services to which Plaintiffs object, the accommodation requires that Plaintiffs either participate in a procedure devised by federal officials to implement ACA's mandate of contraceptive coverage, or incur substantial penalties. Either spiritual or financial harm is sufficient, by itself, to establish an actual injury, traceable to Defendants, and redressable by a ruling in Plaintiffs' favor.

The Court reaches the same conclusion as the district judge in *Roman Catholic Archdiocese of New York*, the Honorable Brian M. Cogan, who capably expressed the analysis of Plaintiffs' injury-in-fact:

> [P]laintiffs' alleged injury is that the [accommodation] renders them complicit in a scheme aimed at providing coverage to which

> they have a religious objection. This alleged spiritual complicity is independent of whether the scheme actually succeeds at providing contraceptive coverage. It is undisputed that all of the non-exempt plaintiffs will still have to either comply with the Mandate and provide the objectionable coverage or self-certify that they qualify for the accommodation. Plaintiffs allege that their religion forbids them from completing this self-certification, because to them, authorizing others to provide services that plaintiffs themselves cannot is tantamount to an endorsement or facilitation of such services. Therefore, regardless of the effect on plaintiffs' TPAs, the regulations still require plaintiffs to take actions they believe are contrary to their religion.

Roman Catholic Archdiocese of New York, 2013 WL 6579764 at *7 (citations omitted).

In short, the alleged fact that the accommodation requires Plaintiffs to take action that is repugnant to their sincere religious beliefs constitutes a sufficient injury to satisfy the constitutional minimum of standing. Therefore, the Court finds that Plaintiffs have standing to challenge the accommodation.

MOTION FOR PRELIMINARY INJUNCTION

To prevail on their Motion, Plaintiffs must establish: a) they are likely to succeed on the merits; b) they are likely to suffer irreparable harm in the absence of preliminary relief; c) the balance of equities tips in their favor; and d) an injunction is in the public interest. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Crowe & Dunlevy, P.C.*

v. Stidham, 640 F.3d 1140, 1157 (10th Cir. 2011); *see also Hobby Lobby*, 723 F.3d at 1128. In this federal circuit, courts generally apply a modified standard under which, if a movant establishes that other requirements tip strongly in his favor, the movant "may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255-56 (10th Cir.2003); *see O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 976 (10th Cir. 2004) (en banc), *aff'd sub nom.*, 546 U.S. 418 (2006). The modified standard does not apply, however, to certain types of "historically disfavored" preliminary injunctions. *See O Centro*, 389 F.3d at 975; *see also Attorney General v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009); *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009). Also, the modified standard does not apply where the movant seeks "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *See Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003); *see also Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006); *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 (10th Cir. 2006). Courts "presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'" *See Aid for Women*, 441 F.3d at 1115 n.15.

In this case, Plaintiffs are seeking to restrain action of federal agencies taken in the public interest, and therefore, the modified standard does not apply. Thus, Plaintiffs "must meet the traditional

'substantial likelihood of success' standard." *Nova Health Sys.*, 460 F.3d at 1298 n.6.

A. Likelihood of Success on the Merits

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that the application of the burden to the person is the least restrictive means of furthering a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1. To establish a claim under RFRA, a plaintiff must prove "the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion." *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001); *see Hobby Lobby*, 723 F.3d at 1125-1126. The burden then shifts to the government, even at the preliminary injunction stage, to show that the compelling interest test is satisfied. *See Hobby Lobby*, 723 F.3d at 1126; *see also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). There is no question in this case that Plaintiffs' religious beliefs are sincere and that their opposition to ACA's contraceptive mandate is a religious exercise. Defendants also concede that, under the holding of *Hobby Lobby*, the federal government cannot satisfy the compelling interest test. *See* Defs.' Mem. Opp'n Pls.' Mot. Prelim. Inj. [Doc. No. 50], at 21. Thus, Plaintiffs' likelihood of success on the merits of their RFRA claim hinges on their ability to establish a substantial burden.

According to the Tenth Circuit, the substantial burden test has three prongs:

> [A] government act imposes a "substantial burden" on religious exercise if it: (1)

> "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief."

Hobby Lobby, 723 F.3d at 1138 (quoting *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). The court of appeals found in *Hobby Lobby* that ACA's coverage mandate substantially burdens the religious exercise of persons who oppose covered contraceptive services on religious grounds under the third, "substantial pressure" prong. Although *Hobby Lobby* is factually distinguishable, the court of appeals' decision teaches the proper framework for a "substantial pressure" analysis.

"First, we must identify the religious belief in this case." *Id.* at 1140. Like the corporate employers in *Hobby Lobby*, Plaintiffs have religious objections to contraceptive methods that they believe cause the death of a fertilized human embryo, and to providing access to or otherwise supporting contraceptive services related to these methods. Further, in this case, Plaintiffs assert that "as a matter of religious faith, Plaintiffs may not participate in any way in the government's program to provide access to these services." *See* Pls.' Mot. Prelim. Inj. [Doc. No. 7] at 11; *see also* Compl. [Doc. No. 1], 177-78. Defendants dispute whether the specific tasks to which Plaintiffs object, such as signing the self-certification form or providing it to a TPA, constitute "participation" in the program or facilitate access to contraceptive services, but Defendants acknowledge the strength of Plaintiffs'

opposition to ACA's contraceptive mandate and the faith-based nature of their opposition.

"Second, we must determine whether this belief is sincere." *Hobby Lobby*, 723 F.3d at 1140. Here, as in *Hobby Lobby*, Plaintiffs' sincerity is unquestioned.

"Third, we turn to the question of whether the government places substantial pressure on the religious believer." *Id.* Here, as in *Hobby Lobby*, Plaintiffs contend that the pressure on their religious beliefs is substantial because participation in the accommodation would violate their beliefs, but refusing to participate will expose them to substantial financial penalties or losses. In response, Defendants contend Plaintiffs' view that participating in the accommodation – by self-certifying their eligibility and providing the self-certification form to a TPA – is legally flawed and misguided because their participation would not actually facilitate access to contraceptive coverage for participants and beneficiaries of the GuideStone Plan. Because, according to Defendants, the accommodation does not apply to church plans and a TPA under the GuideStone Plan need not offer or provide contraceptive coverage, Plaintiffs' self-certification forms would not actually trigger the accommodation process or carry out ACA's contraceptive mandate, and, thus, Plaintiffs' opposition to signing the form is unfounded.

Upon consideration, the Court finds Defendants' argument to be simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*. In that case, the government argued that complying with the contraceptive mandate was not a substantial burden on the employers' beliefs because the burden arose from the independent acts

of third parties, such as employees or dependents who utilized the coverage. This argument was found to be "fundamentally flawed because it advances an understanding of 'substantial burden' that presumes 'substantial' requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Id.* at 1137 (emphasis in original). The court determined that the question for decision was "not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity." *Id.*

In this case, Plaintiffs have measured their complicity in facilitating ACA's contraceptive mandate and determined that participating in the accommodation would endorse contraceptive services they deem morally problematic. As discussed *supra*, Plaintiffs' religious beliefs do not permit them to take the affirmative steps necessary to qualify their employees for certain contraceptive services under ACA's coverage scheme. Regardless whether the self-certification form actually results in the provision of such contraceptive coverage or services,[8] Plaintiffs believe that the acts of executing the form and providing it to a TPA convey support for the accommodation program and its goal of carrying out

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[8] Evidence was presented by Plaintiffs, without effective response by Defendants, that the largest GuideStone TPA, Highmark Inc. ("Highmark"), will provide the objected-to contraceptives upon receipt of the self-certification form. *See* Pls.' Combined Reply Br., Ex. 1, Ormont Decl. [Doc. No. 56-1]. Defendants' litigation position that there is no ERISA enforcement mechanism regarding self-insured church plans utterly fails to address the real potential for voluntary compliance by TPAs such as Highmark.

ACA's contraceptive mandate. The self-certification form states it certifies that the organization's health plan qualifies for the accommodation with respect to the mandate, and it provides notice to a TPA of obligations under the accommodation regulations. In addition, the model language of the written notice that a TPA must give to plan beneficiaries states that their employer has provided the certification, and so separate contraceptive coverage is available from a third party. *See* 26 C.F.R. § 54.9815-2713A(d). Further, as noted, at least one TPA for GuideStone, Highmark, has adopted a plan to carry out the accommodation. Regardless whether Highmark is compelled to comply or does so voluntarily, Plaintiffs' concern for apparent complicity in the accommodation is not unfounded. In short, this Court, like Judge Cogan, rejects Defendants' "it's just a form" argument. *See Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at *14.

Under *Hobby Lobby*, the Court's "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." *Hobby Lobby*, 723 F.3d at 1137. Upon consideration of the record, the Court finds the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate. By refusing to participate, Reaching Souls, Truett-College, and similarly situated organizations face substantial financial penalties, and their refusal will cause a substantial financial loss to GuideStone if it excludes nonexempt, noncompliant organizations from the GuideStone Plan. Here, as in *Hobby Lobby*,

the Court finds that Plaintiffs have made a threshold showing of a substantial burden, and, thus, a likelihood of success on their RFRA claim.[9]

B. Remaining Requirements

The Tenth Circuit has held that "establishing a likely RFRA violation satisfies the irreparable harm factor." *Hobby Lobby*, 723 F.3d at 1146; *see Kikumura*, 242 F.3d at 963. The Court further finds that the harm to Plaintiffs without the injunction outweighs any harm to Defendants' interest in carrying out the accommodation. As noted in *Hobby Lobby*, the government has already granted an exemption from the contraceptive mandate to many religious organizations, and only a small number of contraceptive services covered by the mandate are at issue. In addition, the government has taken the position in this case that the accommodation is not enforceable against the GuideStone Plan anyway. On the other hand, Plaintiffs face the real dilemma of violating their religious beliefs or incurring financial penalties. Finally, in light of the current legal uncertainty regarding the enforceability of the contraceptive mandate in light of *Hobby Lobby* and other federal appellate decisions, the Court finds that the public interest lies in preserving the status quo and preventing enforcement of the accommodation until Plaintiffs' claims are resolved.

CONCLUSION

In summary, the Court concludes that Plaintiffs have satisfied their burden to establish standing to

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[9] In light of this conclusion, the Court need not reach the First Amendment claims on which Plaintiffs also rely in their Motion.

challenge the accommodation and that a preliminary injunction should issue to prevent the federal government from enforcing the accommodation and contraceptive mandate against them.[10]

ORDER

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction [Doc. No. 7] is GRANTED, and that Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction [Doc. No. 51] is DENIED. The following preliminary injunction is issued:

PRELIMINARY INJUNCTION

Defendants, their agents, officers, and employees are hereby enjoined and restrained from taking any enforcement action against Plaintiffs, or any employers who provide medical coverage to employees under the GuideStone Plan and who are "eligible organizations" as defined by 26 C.F.R. § 54.9815-2713A(a), 29 C.F.R. § 2590.715-2713A(a), and 45 C.F.R. § 147.131(b), for not providing coverage for contraceptive services as required by 42 U.S.C. § 300gg-13(a)(4) and related regulations, including any penalties, fines and assessments for noncompliance

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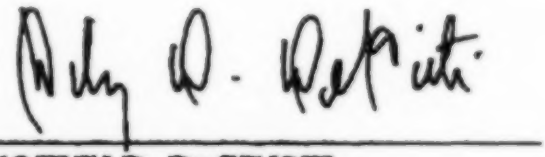
[10] Plaintiffs have offered to provide security, as required by Fed. R. Civ. P. 65(c), by posting a bond in an amount to be determined by the Court. Defendants have not requested security, and this issue was not addressed in further briefing or argument. In this circuit, "trial courts have 'wide discretion under Rule 65(c) in determining whether to require security.'" *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (quoting *Winnebago Tribe of Nebraska v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003)). Under the circumstances presented, the Court finds that Defendants are unlikely to suffer monetary harm if it is later determined they were wrongfully enjoined, and thus, no security is necessary.

with that statute, until further order of the Court.

IT IS SO ORDERED this 20th day of December, 2013.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

APPENDIX E

U.S. Constitution Amendment I provides:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that

violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 300gg-13(a)(4) provides:

§ 300gg-13. Coverage of preventive health services

(a) In general

A group health plan and a health insurances issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

* * *

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

26 U.S.C. § 4980D provides:

§ 4980D. Failure to meet certain group health plan requirements

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each

individual to whom such failure relates.

(2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.—Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination, the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.—In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer)

during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure

which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H provides:

§ 4980H. Shared responsibility for employers regarding health coverage.

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

(b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as

defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or cost-sharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 full-time employees on business days during the

preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.— The term "seasonal worker" means a worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor, including workers covered by section 500.20(s)(1) of title 29, Code of Federal Regulations and retail workers employed exclusively during holiday seasons.

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this

subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as full- time employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402

of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(b) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of—

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(A) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or cost-sharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

29 U.S.C. §1002(16)(A) provides:

§ 1002. Definitions.

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by

regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

26 C.F.R. § 54.9815–2713 provides:

§ 54.9815–2713 Coverage of preventive health services.

(1) Services—(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 54.9815–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) [Reserved]

(ii) [Reserved]

(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in

accordance with 45 CFR 147.131(a).

(1) Office visits. [Reserved]

(2) Out-of-network providers. [Reserved]

(3) Reasonable medical management. [Reserved]

(4) Services not described. [Reserved]

(b) Timing. [Reserved]

(c) Recommendations not current. [Reserved]

(d) Effective/applicability date. April 16, 2012.

26 C.F.R. § 54.9815–2713A provides:

§ 54.9815–2713A. Accommodations in connection with coverage of preventive health services.

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-

certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) [Reserved]. For further guidance, see § 54.9815–2713AT(b).

(c) Contraceptive coverage—self-insured group health plans—(1) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(1).

(2) Payments for contraceptive services. (i) [Reserved]. For further guidance, see § 54.9815–2713AT(c)(2)(i) introductory text.

(iii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide

payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead,

[name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(1) Reliance—insured group health plans. (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) [Reserved]. For further guidance, see § 54.9815-2713AT(f).

26 C.F.R. § 54.9815-2713AT provides:

§ 54.9815-2713AT Accommodations in connection with coverage of preventive health services (temporary).

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services

to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or

indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization

and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(ii) [Reserved]. For further guidance, see §54.9815–2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see §54.9815–2713A(d).

(e) [Reserved]. For further guidance, see §54.9815–2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. §§ 2510.3-16 provides:

§ 2510.3-16 Definition of "plan administrator."

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715-2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter to a third

party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715-2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for--

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg-13) (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to coverage of contraceptive services. To the extent the

plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715-2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503-1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715–2713 provides:

§ 2590.715–2713 Coverage of preventive health services

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph

(c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the

child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended

by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of

paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years beginning on or after September 23, 2010. See § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

29 C.F.R. § 2590.715-2713A provides:

§ 2590.715-2713A. Accommodations in connection with coverage of preventive health services

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the

first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans—

(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and this section.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of

some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), shall send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under § 2510.3-16 of this chapter and this section.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment,

coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans –

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing

coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 2590.715-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer

under this section.

(2) Payments for contraceptive services --(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered

under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self-insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved

contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.130 provides:

§ 147.130 Coverage of preventive health services.

(a) Services—

(1) In general. Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(2) Office visits—

(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) Facts. An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) Conclusion. In this Example 1, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2.

(i) Facts. Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) Conclusion. In this Example 2, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3.

(i) Facts. An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which

has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 3, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4.

(i) Facts. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) Conclusion. In this Example 4, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) Out-of-network providers. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are

delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) Reasonable medical management. Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) Services not described. Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) Timing—

(1) In general. A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later,

for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) Changes in recommendations or guidelines. A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) Recommendations not current. For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) Applicability date. The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. See § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

45 C.F.R. § 147.131 provides:

§ 147.131 Exemption and accommodations in connection with coverage of preventive health services.

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this

section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage—insured group health plans—

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on

which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of § 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section.

(2) Payments for contraceptive services—

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (c)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must-

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any

contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive

services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance –

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to

its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

APPENDIX F

EBSA FORM 700– CERTIFICATION

(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make,	

and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true

and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29

CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at:

http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section

107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.

No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

HHS finally concedes that this Court should resolve the exceptionally important question whether HHS has violated RFRA by insisting that religious nonprofits like petitioners comply with the contraceptive mandate or pay massive fines. Rather than simply acquiesce in this petition, however, HHS now seeks to hand-pick its preferred opponent and to constrain the scope of this Court's review. But HHS's efforts to evade review of this particular petition and the constitutional issues it uniquely raises only highlight the weakness of HHS's position in this case. While that certainly explains HHS's interest in having the Court review a different case, vehicle problems for HHS do not translate into vehicle problems for this Court. After impermissibly trying to pick and choose which religious groups to exempt from the contraceptive mandate, HHS should not now be allowed to pick and choose its opponent or which questions it must confront in defending its actions.

HHS first suggests that the Little Sisters of the Poor are an "especially unsuitable" employer to complain about being forced to take the affirmative actions that HHS deems sufficient to put them in compliance with the mandate because those actions may not actually result in the provision of contraceptive coverage to their employees. In fact, that makes the Little Sisters especially well-suited to complain, as whatever interest HHS may have in demanding that a religious nonprofit sacrifice its religious beliefs so that HHS can accomplish its regulatory goal, surely it does not have a compelling interest in demanding that same sacrifice when it may still leave HHS's ultimate objective

unsatisfied. That makes this case a uniquely suitable vehicle for resolving the RFRA question, as this case alone provides the Court with the opportunity to consider HHS's regulatory scheme both in a situation where compliance *will* result in contraceptive coverage (the *Reaching Souls* petitioners) and a situation where it may not (the *Little Sisters* petitioners).

Moreover, this case alone presents the additional question of whether the discrimination among religious employers that has given rise to petitioners' RFRA claims can be reconciled with the Constitution. HHS understandably would prefer not to have to explain to this Court how it is that the dioceses of the Catholic Church are entitled to an exemption from the contraceptive mandate while the Little Sisters are not, even though both unquestionably are religious organizations that share the exact same religious objection. HHS instead attempts to downplay that discrimination by labeling its exemption for houses of worship and their integrated auxiliaries an "automatic exemption." But that "automatic" exemption is the *only* exemption HHS allows; for every other religious employer, it is either compliance or ruinous fines. Remarkably, HHS no longer appears willing to defend the principal justification that it advanced and that the regulations still state for so narrowly confining its exemption (*viz.*, its sheer speculation about the likelihood that employees share their employers' religious beliefs), leaving its discrimination among religious employers essentially unexplained. No wonder HHS seeks to avoid review of the constitutional question.

In short, HHS's peculiarly strong resistance to this particular petition can be explained only by its strong desire to avoid the questions this petition alone would

force it to confront. Indeed, HHS does not even try to explain how it could possibly have a compelling interest in requiring an employer in the Little Sisters' situation to take actions that it sincerely believes would violate its religion, or in refusing to grant an order of nuns the same exemption that it would provide if the exact same home for the elderly were funded and controlled by bishops instead of nuns. Having conceded that certiorari on the RFRA issue is appropriate, HHS has no valid basis to limit this Court's review to cases where its compelling interest argument may be stronger and where the constitutionality of its religious discrimination is not squarely presented.

I. This petition is an ideal vehicle to resolve the RFRA question that HHS now concedes warrants this court's review.

Although HHS acknowledges that this Court should resolve the RFRA question that has divided the Circuits, it insists that this is "an especially unsuitable vehicle" in which to do so because "the unusual and uncertain circumstances" of the Little Sisters somehow "weaken" their substantial burden argument. BIO 20. But setting aside the fact that those circumstances are common to more than 400 non-exempt religious employers, LSP C.A.App.172a, the uncertainty to which HHS alludes—namely, whether HHS will actually succeed in turning the Little Sisters' forced compliance with the contraceptive mandate into the provision of coverage through their plans—does not materially alter the substantial burden analysis. The Little Sisters sincerely object to taking actions that HHS deems sufficient to comply with its contraceptive mandate and that may result in the provision of contraceptives. HHS is in no position to question the sincerity of

the Little Sisters' beliefs, and the only alternative to compliance HHS offers is payment of the same fines that constituted a substantial burden in *Hobby Lobby*. See *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76 (2014); Pet.App.196a, 212a-13a.

HHS claims that the substantial burden argument is "weaker" only because it continues to mischaracterize petitioners' RFRA claims as objecting only to "the government's independent arrangements with third parties." BIO 18, 20. But as petitioners have confirmed time and again, their objections are not to the actions of third parties, but to the actions HHS would compel *petitioners* to take—indeed, threatens them with ruinous fines unless they take—to assist HHS in its efforts to obligate or incentivize those third parties to provide contraceptive coverage to their employees. The Little Sisters must take precisely the same religiously forbidden actions as all other non-exempt religious employers, and they face precisely the same penalties if they fail to do so. That is because HHS requires *every* non-exempt religious employer to supply it with the information and authority it needs to try to obligate or convince third parties to provide coverage, even if HHS has little reason to believe that it will actually succeed in doing either.

What this petition really reveals, then, is not any weakness in the Little Sisters' case, but rather a glaring weakness in *HHS*'s case. HHS cannot plausibly claim the kind of compelling interest that RFRA demands when the most HHS can say is that the forced sacrifice of sincerely held religious beliefs might—but just as well might not—achieve its ultimate regulatory objective of providing contraceptive coverage. Indeed, HHS does not even try to explain how it could satisfy

the compelling interest test as to the Little Sisters. That certainly explains HHS's desire to avoid this particular petition, but what matters is which vehicle is best for this Court, not for HHS. And the fact that HHS has a particularly weak case as to the Little Sisters and hundreds of similarly situated employers underscores why it is essential to take this petition even if the Court takes another as well, so the Court is in a position to determine whether that weakness is fatal under RFRA.

Moreover, HHS largely ignores the fact that the Little Sisters are not the only parties to this petition. The petitioners also include the parties to the *Reaching Souls* case, in which the record confirms that the largest TPA associated with the employers' plans said it *will* provide contraceptive coverage if employers comply with the mandate via the "accommodation." Specifically, the record demonstrates that the TPA will communicate to each organization's employees (and their female dependents, starting at age 10) that the objected-to abortifacients are available through the plan. RSI C.A.App.A317, A321-22. And the TPA would facilitate that coverage by using GuideStone's plan infrastructure to contact all participants, identify participants by "payroll location," and perform "[o]ngoing nightly feeds" of information. RSI C.A.App.A321.[1]

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[1] The existence of this record evidence is a product of another advantage unique to this petition—namely, that it includes not just employers but also plans (GuideStone and Christian Brothers Employee Benefit Trust) and a TPA (Christian Brothers Services). The presence of these parties

That makes this a particularly good vehicle for resolving the RFRA question, as it combines the only two scenarios in which the differences among employers and plans could even arguably make a difference under RFRA. While HHS continues to focus its vehicle arguments on distinctions between insured versus self-insured plans, and church versus non-church plans, neither HHS nor any petitioner has argued that those distinctions matter on the merits at all. Instead, the only even potentially relevant distinction for RFRA purposes is between a case in which HHS can at least claim that forcing the employer to violate its religious beliefs would achieve HHS's ultimate regulatory objective, and a case in which HHS cannot even say that. While every case—regardless of the employer's plan—falls into one of those two categories, this petition alone combines both a case in which the ultimate provision of coverage is uncertain (*Little Sisters*) and one in which coverage is certain, because the TPA has stated that it will comply (*Reaching Souls*).

HHS alternatively complains that the Tenth Circuit did not reach the compelling interest or least restrictive means questions. BIO 20. But those issues not only were fully developed in both courts below, but (as in the Fifth Circuit case) actually were resolved by one of the District Courts in granting injunctive relief. HHS thus is just as free to defend the judgment on those alternative grounds as it would be in any other pending petition, and it is just as free to rely on the

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resulted in more detailed evidence about the mechanics of HHS's regulatory scheme and ensures that the Court will hear from parties in all of the relevant roles—employer, plan, and TPA.

D.C. Circuit's dicta on those issues if it chooses to do so. Indeed, HHS does not suggest that anything would preclude the Court from resolving those issues, and HHS undoubtedly would ask the Court to do so given that Tenth Circuit precedent would make remand on the compelling interest question futile. See *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1143-45 (10th Cir. 2013) (en banc).

II. This petition alone presents the question whether HHS's actions are constitutional.

This petition also is a particularly good vehicle because it alone presents the question of whether the facial discrimination among religious groups that gave rise to petitioners' RFRA claims violates the First Amendment. That discrimination is evident both in HHS's treatment of the *Little Sisters* petitioners, and in its treatment of the evangelical Christian organizations in *Reaching Souls*, which are traditionally even less likely to integrate with a particular house of worship.

HHS's brief certainly succeeds in revealing just how loath it is to defend its inexplicable view that orders of nuns are not entitled to the same exemption from the contraceptive mandate that would be available if the exact same homes, with the exact same employees, were operated by their local dioceses. But HHS utterly fails to explain why this Court should confine itself to considering the RFRA problems with HHS's regulatory scheme when those problems exist only because that scheme unconstitutionally discriminates among religious groups.

As an initial matter, just as HHS persists in misrepresenting the nature of petitioners' RFRA claims,

it likewise seeks to artificially cabin the scope of their constitutional claims, proceeding as if they implicate only the Establishment Clause when petitioners have argued throughout this case that HHS's actions violate *both* Religion Clauses. See, *e.g.*, Pet.34; Pet.App.96a, LSP C.A.App.136a. And they have done so for good reason, as *both* clauses restrict the government's ability to pass laws or regulations expressly designed to treat some religious organizations more favorably than others. Indeed, it is well settled under both pre- and post-*Smith* law that withholding religious exemptions from some religious groups but not others "without compelling reason" violates the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 537 (1993); see also, *e.g.*, *Employment Division* v. *Smith*, 494 U.S. 872, 884 (1990); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Fraternal Order of Police* v. *City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.).

More notable still, HHS offers absolutely no defense of the justification for discriminating among religious groups that it advanced in the Federal Register and dozens of filings across the lower courts—namely, its speculation that houses of worship and their integrated auxiliaries are more likely than other religious groups to hire coreligionists. See, *e.g.*, Pet. 35-36 (quoting 78 Fed. Reg. 39,870, 39,874). That omission is tantamount to an admission that HHS's guesswork about the beliefs of employees of religious organizations has "zero factual support." Pet. 35; see also Carmelite Sisters Amicus Br. 15-20. Of course, that implicit admission is hardly surprising given that HHS has not one iota of experience or expertise or authority to assess

such questions. But HHS's failure to defend its contemporaneous explanation for picking and choosing among religious employers is reason enough for this Court's plenary review of the constitutional question.

Instead of defending its contemporaneous explanation for its religious discrimination, HHS now just drops a footnote asserting that its discrimination was actually the product of "tradition." BIO 22 n.12. This newfound defense not only comes far too late (this is not rational basis review where late-breaking theories count), but also fails on its own terms, as there simply is no "tradition" of favoring parish priests over orders of nuns. To be sure, the Internal Revenue Code asks some religious groups to provide more information than others to assist in determining their tax liability. But that has no bearing whatsoever on the scope of religious groups' constitutional rights, particularly when all sorts of other laws entitle religious groups such as petitioners to the same protections as houses of worship and their integrated auxiliaries. See, *e.g.*, Dominican Sisters of Mary Amicus Br. 6-19; Carmelite Sisters Amicus Br. 21-23.

If any "tradition" is relevant here, moreover, it is the constitutional tradition of equal treatment for all with sincerely held religious beliefs and the statutory tradition of exempting *all* religious employers, not just houses of worship and their integrated auxiliaries, from prohibitions on considering religion when hiring employees. See 42 U.S.C. 2000e-1(a). As that statutory exemption reflects, Congress itself has recognized that the Constitution entitles *all* religious employers, not just those that have a particular "organizational form," BIO 23, to exemption from laws that would interfere with their ability to conduct their workplace

relations in a manner consistent with their religious beliefs. HHS's insistence on consulting the Internal Revenue Code, rather than civil rights laws, for wisdom about the proper scope of religious protections suggests it was looking in the wrong place for a post-hoc justification for the miserly scope of an exemption that properly belongs to all religious employers.

In any event, this Court has already emphatically rejected the notion that the government may consider religious groups' internal structures when handing out sensitive conscience rights. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012); *Larson* v. *Valente*, 456 U.S. 228, 246 n.23 (1982). HHS tried a variation on the same argument in *Hobby Lobby* and lost. Conscience rights do not turn on corporate form; they should not turn on religious polity either. Independent Women's Forum Amicus Br. 4-7; accord *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) ("The First Amendment's free exercise protections, the Court has indeed recognized, shelter churches and other nonprofit religion-based organizations."). Indeed, "organizational form" is barely even a rational reason—let alone a "compelling" one, *Lukumi*, 508 U.S. at 537—for exempting some religious groups but not others from a requirement as sensitive as the contraceptive mandate. And it certainly is not a reason that can suffice when HHS's own regulations and briefs defending them confirm that it is using "organizational form" as a proxy for intensity of belief—*i.e.*, for something that the Religion Clauses unquestionably prevent the government from invoking as a basis for deciding whose religious exercise to protect.

In short, it is hard to think of a clearer violation of the Constitution's Religion Clauses than a regulation that is specifically designed to protect houses of worship but leave out equally religious organizations like petitioners, even though they assert the exact same religious objection with the exact same religious conviction, to the exact same religiously sensitive requirement. "[W]hen the [government] passes laws that facially regulate religious issues"—as HHS's scheme unabashedly does—"it must treat individual religions and religious institutions without discrimination or preference." *Colorado Christian Univ.* v. *Weaver*, 584 F.3d 1245, 1257 (10th Cir. 2008) (McConnell, J.) (internal quotation marks omitted). By failing to do so, HHS has violated not just RFRA, but also the Constitution.

* * *

HHS is in a bind. It acknowledges, as it must, that it can no longer try to keep this Court from reviewing its novel attempt to force religious employers to take actions that HHS itself deems sufficient to put them in compliance with a mandate that concededly runs counter to one of their most fundamental religious beliefs. But HHS does not want the Court to consider this *particular* petition, these *particular* petitioners, or these *particular* issues. The reasons for HHS's resistance are self-evident. Whereas HHS would prefer to obscure the details of its regulatory scheme, this case makes them clear. Whereas HHS would prefer not to talk about the First Amendment, this case would oblige it to. And whereas HHS would prefer to sidestep the clarifying reality—highlighted by petitioners' unique level of amicus support—that it is discriminating against an order of nuns on the basis of

religious distinctions it has no business making, this case makes that reality undeniable. If RFRA and the Constitution really allow that, then HHS should make its case here.

Respectfully submitted.

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No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for *amici*, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The ACLJ has been active in litigation concerning the Affordable Care Act ("ACA"), the statute on which Respondents rely to promulgate the regulatory mandate, at issue here, to require employers to cover contraceptive services, including abortion-inducing drugs, sterilization, and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ filed several *amicus curiae* briefs in support of various challenges to provisions of the ACA, *e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), and represented the plaintiffs in their challenge to provisions of the ACA in *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *superseded on other grounds by* 132 S. Ct. 2566 (2012).

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing this brief. Copies of the parties' consent letters are on file with the Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In addition, the ACLJ has represented numerous closely held corporations and their owners in challenges against the Mandate, *e.g.*, *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), *vacated and remanded*, 134 S. Ct. 2902 (2014), and filed an *amicus curiae* brief with this Court in support of plaintiffs in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

This case is gravely important to the future protection of religious freedom in this country and is therefore of special interest to the ACLJ.[2]

SUMMARY OF ARGUMENT

Last year, this Court held that the United States Department of Health and Human Services ("HHS") violated the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb *et seq*. ("RFRA"), when it imposed an obligation on closely held corporations to "provide health-insurance coverage for methods of contraception that violate[d] the sincerely held beliefs of the companies' owners." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014). Now, HHS is imposing unlawful obligations on non-profit religious organizations with religious objections to contraceptive services by requiring them to take affirmative action, through participation in a so-called "accommodation" scheme, that violates their religious conscience.

In this case, HHS is mandating that Petitioner, Little Sisters of the Poor Home for the Aged ("Little

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[2] This brief is also submitted on behalf of more than 140,000 supporters of the ACLJ as an expression of their opposition to the Mandate's encroachment on religious civil liberties.

Sisters"), a Catholic religious order of women religious, execute a document that the Little Sisters insist will trigger—and HHS, ironically, insists is *essential* to—the provision of contraception coverage to their employees, using the information, network, and infrastructure of the Sisters' health plan. This, the Little Sisters believe, will render them morally complicit in providing contraceptive coverage against their religious beliefs. Such complicity is forbidden by the Little Sisters' Catholic faith.

The Tenth Circuit upheld HHS's action on the grounds that executing the document involved mere "*de minimis* administrative tasks [that] do not substantially burden religious exercise for the purposes of RFRA. *Little Sisters of the Poor Home for the Aged v. Burwell*, No. 13-1540, 2015 U.S. App. LEXIS 12145, *51 (10th Cir. July 14, 2015). In other words, the Tenth Circuit deemed the Little Sisters' moral analysis of complicity unreasonable, because their execution of the accommodation document would not *actually* render them complicit. Thus, according to the lower court, the accommodation does not substantially burden the Little Sisters' religious exercise.

The Tenth Circuit's decision is both wrong and completely antithetical to genuine religious liberty. This case is not materially distinguishable from *Hobby Lobby*. Though the Little Sisters have been afforded an alternative not afforded the *Hobby Lobby* plaintiffs, the unacceptability of this alternative negates its value to the Little Sisters. Compulsion to engage in two or three bad options in no less a RFRA violation than a compulsion to engage in one.

The Tenth Circuit wrongly second-guessed the Little Sisters' theological analysis of their culpability. The proper, and narrow, role of the courts in determining whether a religious objector's exercise is substantially burdened under RFRA is to determine the substantiality of the *penalties* for noncompliance, not to question the objector's moral theology. Hypothetical concerns about opening the door to more religious objection claims cannot be used to defeat a finding of substantial burden. If the Tenth Circuit had properly found that HHS substantially burdened the Little Sisters' religious exercise, they would have prevailed on their RFRA claim.

ARGUMENT

I. This case is not materially distinguishable from *Hobby Lobby*.

The Tenth Circuit held that *Hobby Lobby* does not control this case because of the supposed "accommodation" available to the Little Sisters. HHS demands that the Little Sisters (1) directly comply with the Mandate themselves by paying for and providing the drugs and services to which they religiously object, or (2) execute a document that triggers HHS's arrangement of such coverage through their insurer (the so-called "accommodation"), or (3) pay a significant monetary penalty for failure to comply. The Little Sisters sincerely believe that the first two options—direct compliance and the facilitation of the same wrong—violate their religious beliefs and substantially burden their religious exercise. As for the third option, this Court held in *Hobby Lobby* that a government action requiring employers to choose between violating their religious consciences and

paying a financial penalty constitutes a substantial burden on religious exercise. *Hobby Lobby*, 134 S. Ct. at 2759.

In *Hobby Lobby*, the government required the plaintiffs to choose between two alternatives: (1) comply with the Mandate by providing contraceptive coverage in violation of their religious consciences or (2) not comply and pay significant penalties. *Hobby Lobby*, 134 S. Ct. at 2766. The Court concluded, "If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price . . . If these consequences do not amount to a substantial burden, it is hard to see what would." *Id.* at 2759.

As the Tenth Circuit correctly noted, the Little Sisters have three rather than two religiously burdensome alternatives from which to choose. However, the Tenth Circuit wrongly believed that this difference between the cases "[was] significant and frame[d] the issue. . . ." *Little Sisters*, 2015 U.S. App. LEXIS 12145 at *13. In reality, the Little Sisters' predicament is equally as onerous as was the predicament of the plaintiffs in *Hobby Lobby*. The only difference between *Hobby Lobby* and this case is that there are two options (instead of one) that violate Petitioner's religious conscience. The issue in both cases is therefore the same: whether requiring the Little Sisters to pick their poison in the form of violating their religious conscience or paying a significant monetary penalty constitutes a substantial burden on religious exercise.

The Tenth Circuit erred by rejecting the *Hobby Lobby* framework as controlling; had it not done so, it would have been obligated to follow *Hobby Lobby's* rule against second-guessing the reasonableness of a religious objector's claim.

II. *Hobby Lobby* does not permit courts to second-guess the reasonableness of a religious objector's sincere claim.

The Tenth Circuit disagreed with the Little Sisters' claim that availing themselves of the accommodation scheme would render them morally complicit in providing contraceptive services, and that such complicity would substantially burden their religious beliefs and practices. The Tenth Circuit held that *"[a]lthough we recognize and respect the sincerity of Plaintiffs' beliefs and arguments*, we conclude the accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights." *Little Sisters*, 2015 U.S. App. LEXIS 12145 at *12 (emphasis added). The Tenth Circuit based its conclusion on the following reasoning:

> The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to opt out of the Mandate make them complicit in the

> overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

Id. at *50–51.

This logic is fundamentally flawed. The Tenth Circuit—and the federal government—cannot simultaneously argue that the act it requires of the Little Sisters is *de minimis* and causally meaningless, and yet assert that this same act is somehow essential to the functioning of the government's contraceptive program. If the act were truly *de minimis*, and the coverage compelled independently by federal law, then the government could waive the requirement (as it does for churches, grandfathered plans, etc.). A government agency does not litigate ferociously in defense of a meaningless requirement.

Moreover, in reaching its conclusion, the Tenth Circuit did something *Hobby Lobby* forbids, namely, instruct the Little Sisters that their religiously motivated complicity claim is unreasonable, because—contrary to what the Little Sisters themselves believe—the steps the Little Sisters must affirmatively take to obtain the so-called "accommodation" is *actually* a minimal, morally meaningless intrusion on their religious exercise. In other words, the Tenth Circuit improperly sat in judgment of a theological conclusion.

In contrast to the Tenth Circuit, this Court deferred to the plaintiffs' religious beliefs in *Hobby Lobby*, stating: "[I]n these cases, the [plaintiffs'] sincerely

believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and *it is not for us to say that their religious beliefs are mistaken or insubstantial*. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S. Ct. at 2779 (citation omitted) (emphasis added).

The Court's analysis was in response to a similar argument HHS makes in this case. In *Hobby Lobby*, faced with plaintiffs who would not comply with the contraceptive coverage mandate due to their religious opposition to abortion, HHS asserted that the "connection between what the objecting parties must do . . . and the end they find to be morally wrong . . . is simply too attenuated" to constitute a substantial burden. *Id.* at 2777. Specifically, HHS argued, "[c]overage would not itself result in the destruction of an embryo," and insisted, "[t]hat would occur only if an employee chose to take advantage of the coverage and to use one of the four methods [of contraception] at issue." *Id.*

This Court rejected HHS's second-guessing of the plaintiffs' analysis of their complicity, holding that this approach "dodges the question RFRA presents"; namely, evaluating the substantial burden imposed by the government on the objecting parties' ability to exercise "*their* religious beliefs"—not what a court or executive agency considers their religious beliefs to entail. *Id.* at 2778 (emphasis added). The complicity analysis used by "HHS . . . in effect tell[s] the plaintiffs that their beliefs are flawed"—but "the federal courts have no business addressing whether the religious

belief asserted in a RFRA case is reasonable." *Id.* "It is not for the Court to say that the religious beliefs of the plaintiffs are mistaken or unreasonable." *Id.* at 2757.

The proposition that courts have no business scrutinizing a religious objector's understanding of his own moral complicity is not new. *Id.* at 2778; *cf. Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 101 S. Ct. 1425 (1981). A court's only task in evaluating the burden prong in a RFRA case is the "narrow function" of "determining whether the line drawn reflects an honest conviction." *Hobby Lobby,* 134 S. Ct. at 2779 (internal quotes removed).

The Tenth Circuit paid little heed to this precedent. The court below was wrong to second-guess the Little Sisters' *own* theological analysis of their *own* moral complicity that was based on their sincerely held religious beliefs.

III. RFRA, properly applied, does not lead to the slippery slope of religious believers becoming a law unto themselves.

It is not true that granting the Little Sisters, and similarly situated nonprofit religious groups, relief from complying with the contraceptive mandate will lead to a slippery slope where any religious individual or group can invalidate important, generally applicable laws. RFRA imposes serious safeguards against the misuses of such claims. In particular, only a *sincere* claim of religious exercise may proceed—opportunistic shams are not protected. *Id.* at 2774, n. 28. Moreover, simply recognizing that a religious objector's beliefs and practices are substantially burdened does not mean that the objector will automatically prevail

against competing government interests. As this Court recently noted in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), a federal regulation will only be struck down under RFRA when, as RFRA itself states, there is either no compelling interest or there is a less restrictive means available to the government for achieving its interest. *Id.* at 863; 42 U.S.C. § 2000bb–1(b). In this case, there exists at least one other way for the government to fulfill its interests through less restrictive means: allow employees to seek out subsidized contraceptive benefits themselves on the ACA's exchanges. *Hobby Lobby,* 134 S. Ct. 2783.

Accepting the Little Sisters' understanding of what constitutes a substantial burden under RFRA reflects sound Establishment Clause principles of avoiding excessive entanglement between government and religion. *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971). *See also Agostini v. Felton,* 521 U.S. 203 (1997). The real slippery slope danger in this case is the excessive entanglement problem that the Tenth Circuit has established in allowing courts to second-guess a religious adherent's understanding of what does and does not constitute a substantial burden on that adherent's religious beliefs. Such second-guessing puts judges in the untenable position of arbitrating essentially religious questions, which the First Amendment's Religion Clauses do not permit. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.,* 132 S. Ct. 694, 712 (2012); *Hobby Lobby*, 134 S. Ct. at 2778 (citations omitted).

Judicial second-guessing of religious beliefs appears to reflect a fear that protecting religious liberty will make each man a law unto himself, ultimately

resulting in harm to third parties. *See Employment Div. v. Smith*, 494 U.S. 872, 911–913 (1990). However, legal precedent of this Court and the wording of RFRA itself allay these concerns. *See Hobby Lobby*, 134 S. Ct. at 2783-2785. This Court stressed that its ruling did not "suggest that RFRA demands accommodation of . . . religious beliefs no matter the impact that accommodation may have on" others. *Id.* at 2760 (internal quotations omitted). A claim under RFRA for a religious accommodation cannot be used to justify any and all religious exemptions.

Moreover, it should be noted, the mischaracterization of religious free exercise as denying or imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1972). The parent who removes his or her Amish child from formal high school education denies that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," Forward.com (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham.").[3] And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, World Health Organization media

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[3] http://forward.com/articles/152606/constitutional-dilemma-on-birth-control/ (last visited, August 20, 2015).

centre fact sheet (Feb. 2014),[4] or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 NeuroReport 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb),[5] each impose upon the would-be recipients of those procedures (or their parents). To be sure, concrete injury to third parties, when actually present, is a valid consideration in applying strict scrutiny to assertions of religious freedom. But treating religious exercise as presumptively suspect because it may affect third parties makes no more sense than treating free speech, freedom of association, or Fourth Amendment rights as presumptively suspect because they, too, may affect third parties in some vague or indirect way.

As *Hobby Lobby* observes, past precedent prevents every man from becoming a law unto himself in the context of religious freedom. *Id.* at 2783-84 (citing *United States v. Lee*, 455 U.S. 252 (1982)). In *Lee*, this Court held that "not all burdens on religion are unconstitutional." *Lee*, 455 U.S. at 257. Specifically, this Court held that "the State may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest," such as running a national tax system. *Id.* (citations omitted). While *Lee* was a pre-RFRA decision, in *Hobby Lobby*, this Court applied *Lee* as evidence of an instance in which the government's actions would be both in furtherance of a compelling government

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[4] http://www.who.int/mediacentre/factsheets/fs241/en/ (last visited, August 20, 2015).

[5] http://cbc.ucsd.edu/pdf/apotem.pdf (last visited, August 20, 2015).

interest and be the least restrictive means to further that interest, satisfying RFRA. *Hobby Lobby*, 134 S. Ct. at 2783-84. Judicial second-guessing of a religious claimant's understanding of what constitutes coercive pressure on his or her ability to practice religion is thus neither proper nor necessary to protect the rule of law.

IV. The HHS accommodation scheme is not the least restrictive means of achieving the government's interests.

While the court below did not reach the issue, it merits emphasis that requiring the Little Sisters to avail themselves of the accommodation scheme is not the least restrictive means of advancing a compelling government interest. *Id.* at 112.

Assuming, for purposes of strict scrutiny, that the provision of free contraceptive healthcare to all female employees constitutes a compelling government interest, HHS's accommodation scheme is not the least restrictive means of furthering that interest. In *Hobby Lobby*, this Court reaffirmed that "[t]he least-restrictive means standard is exceptionally demanding," and that, under this standard, the government must show it does not have "other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties . . ." *Hobby Lobby*, 134 S. Ct. at 2780 (citations omitted). In this case, HHS has other means of providing contraceptive coverage without requiring the Little Sisters to undertake any action that violates their religious convictions.

This Court suggested in *Hobby Lobby* that "the most straightforward way" of increasing access to free

contraception in a manner that is less-restrictive on religious employers would be for the government to "assume the cost of providing the . . . contraceptives to women unable to obtain coverage due to their employers' religious objections." *Id.* at 2757. This Court found it hard to understand how, if the object of the contraceptive mandate really is a compelling government interest, the government "cannot be required under RFRA to pay *anything* in order to achieve this important goal." *Id.* at 2781. After all, under certain circumstances, RFRA may "require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781.

Moreover, instead of requiring religious objectors, such as the Little Sisters, to provide contraceptive coverage themselves or to avail themselves of a scheme that they believe makes them morally complicit in providing contraceptive coverage against their religious conscience, the government could simply authorize individual employees who want free contraceptive coverage to seek it out through the ACA's insurance exchanges, rather than through the employer's insurance plan, with whatever subsidy the government deems necessary. This proposed solution would be consistent with many other public benefit programs that require citizens to enroll themselves before obtaining benefits, and it is therefore a less restrictive alternative under RFRA. *See Hobby Lobby*, 134 S. Ct. at 2760 ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing.").

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully ask this Court to grant the Petition for a Writ of Certiorari.

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No. 15-105

In The Supreme Court of the United States

LITTLE SISTERS OF THE POOR
HOME FOR THE AGED, Denver, Colorado, et al.,

Petitioners,

v.

SYLVIA BURWELL, Secretary of
Health and Human Services, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICUS CURIAE BRIEF OF ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CHRISTIAN MEDICAL ASSOCIATION, CATHOLIC MEDICAL ASSOCIATION, THE NATIONAL CATHOLIC BIOETHICS CENTER, ALABAMA PHYSICIANS FOR LIFE, NATIONAL ASSOCIATION OF PRO LIFE NURSES, AND NATIONAL ASSOCIATION OF CATHOLIC NURSES-U.S.A. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

It is undisputed as a matter of science that a new, distinct human organism comes into existence during the process of fertilization – at the moment of sperm-egg fusion – and before implantation of the already-developing embryo into the uterine wall. Many drugs and devices labeled by the U.S. Food and Drug Administration as "emergency contraception," however, have post-fertilization (*i.e.*, life-ending) mechanisms of action which destroy the life of a human organism. In other words, these drugs and devices can work after a new human organism is created (at fertilization). Such "contraceptive" methods may prevent implantation and therefore "pregnancy," as defined by Respondents and their *amici*, but by preventing implantation these drugs and devices end the life of a unique human being.

Amici curiae are eight national organizations whose members include physicians, bioethicists, and other healthcare professionals who have a profound interest in protecting all stages of human life. *Amici* support a variety of public and private efforts that address healthcare affordability and accessibility, but

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[1] Pursuant to this Court's Rule 37.2(a), the parties received at least ten-days' notice of the intent to file this brief. Written consent was obtained from the parties and is submitted with this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

oppose Respondents' requirement that private insurance plans cover drugs and devices with post-fertilization mechanisms of action. Cooperating with Respondents to arrange for and facilitate such coverage violates the sincere religious beliefs and freedom of conscience held by Petitioners and, therefore, to the extent that the government coerces their compliance and cooperation, that coercion is unlawful under the Religious Freedom Restoration Act (RFRA) and is unconstitutional.

Amici include the following medical and ethics associations:

Association of American Physicians & Surgeons (AAPS) is a national association of physicians. Founded in 1943, AAPS has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has been a litigant before this Court and in other appellate courts. *See, e.g.*, *Association of American Physicians & Surgeons v. Mathews*, 423 U.S. 975 (1975). In addition, this Court has specifically cited *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 933 (2000); *id.* at 959, 963 (Kennedy, J., dissenting); *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting).

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of approximately 2,500 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College of Obstetricians & Gynecologists (ACOG) for 40 years, from 1973 until 2013, until ACOG discontinued the designation of "special interest group."

Christian Medical Association, founded in 1931, is a non-profit national organization of Christian physicians and allied healthcare professionals with almost 14,000 members. It also has associate members from a number of allied health professions, including nurses and physician assistants.

Catholic Medical Association is a non-profit national organization comprised of over 2,000 members representing over 75 medical specialties.

The National Catholic Bioethics Center, established in 1972, conducts research, consultation, publishing, and education to promote human dignity in health care and the life sciences, and derives its message directly from the teachings of the Catholic Church.

Alabama Physicians for Life (APFL) is a non-profit medical organization that exists to draw attention to the issues of abortion and contraception. APFL encourages physicians to educate their patients regarding the innate value of human life at all stages

of development, as well as the risks inherent in abortion.

National Association of Pro Life Nurses (NAPN) is a national non-profit nurses' organization with members in every state. NAPN unites nurses who seek excellence in nursing for all and seeks to protect the ethical values of the nursing profession.

National Association of Catholic Nurses-U.S.A. is a national non-profit organization that gives nurses of different backgrounds the opportunity to promote Catholic moral principles in nursing and to stimulate desire for professional development.

Based on the destructive, post-fertilization effect of "emergency contraception" and the coercive, unconstitutional actions of Respondents requiring Petitioners to violate their religious beliefs and consciences, *Amici* urge this Court to reverse the lower court.

SUMMARY OF ARGUMENT

The Affordable Care Act (ACA) requires that non-grandfathered private health insurance plans "provide coverage for and shall not impose any cost sharing requirements for . . . preventive care and screenings [for women]."[2] Respondents' regulatory mandate implementing this provision (the "Mandate")

[2] 42 U.S.C. §300gg-13.

requires these plans to fully cover, without co-pay, all drugs and devices labeled by the Food and Drug Administration (FDA) as "contraception."[3] It is scientifically undisputed that the life of a new human organism begins at fertilization. *See* Part I, *infra*. However, the FDA's definition of "contraception" includes drugs and devices with known post-fertilization (*i.e.*, life-ending) mechanisms of action.[4] *See* Part II, *infra*. Forcing employers to cooperate with Respondents in providing coverage of life-ending drugs and devices violates the conscientious beliefs of Petitioners and Americans across the nation.

Respondents exercised their discretion to create exemptions for churches and their integrated auxiliaries and conventions/associations. However, Respondents demand that certain religious non-profit employers, including Petitioners, which share the same religious objections as those churches that were granted exemptions, comply with the Mandate through a so-called "accommodation." *See* Part III.A., *infra*.

When the life-ending mechanisms of action of "emergency contraception" are understood, it is clear that, under this "accommodation," Respondents

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[3] *See* Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/. All internet sites visited August 11, 2015.

[4] *See* FDA, *Birth Control: Medicines To Help You* (updated Jan. 8, 2015), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

effectively force Petitioners' cooperation in facilitating coverage for these drugs and devices in violation of their religious rights, contradicting this nation's long-standing commitment to the freedom of conscience. *See* Part III.B., C., and D., *infra*.

ARGUMENT

I. It is Undisputed that a New Human Organism is Created at Fertilization.

It is undisputed as a matter of science that a new, distinct human organism comes into existence during the process of fertilization, which begins at the time of sperm-egg fusion and before implantation.[5] Scientific literature is replete with statements regarding the beginning of human life:

- "The fusion of sperm and egg membranes ***initiates the life*** of a sexually reproducing organism."[6]
- "The ***life cycle of mammals begins*** when a sperm enters an egg."[7]

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[5] *See, e.g.*, Condic, *When Does Human Life Begin? A Scientific Perspective* (The Westchester Institute for Ethics & the Human Person Oct. 2008), http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf; George & Tollefsen, EMBRYO 39 (2008).

[6] Marsden et al., *Model systems for membrane fusion*, CHEM. SOC. REV. 40(3):1572 (Mar. 2011) (emphasis added).

- "Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce ***a genetically distinct individual***."[8]

- "The oviduct or Fallopian tube is the anatomical region where ***every new life begins*** in mammalian species. After a long journey, the spermatozoa meet the oocyte in the specific site of the oviduct named ampulla, and fertilization takes place."[9]

- "Fertilization – ***the fusion of gametes to produce a new organism*** – is the culmination of a multitude of intricately regulated cellular processes."[10]

Respondents' own definition attests to the fact that human life begins at fertilization. According to the National Institutes of Health, "fertilization" is the "process of union of two gametes whereby the somatic chromosome number is restored *and the development*

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[7] Okada et al., *A role for the elongator complex in zygotic paternal genome demethylation*, NATURE 463:554 (Jan. 28, 2010) (emphasis added).

[8] Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, CELL TISSUE RES. 349(3):765 (Mar. 20, 2012) (emphasis added).

[9] Coy et al., *Roles of the oviduct in mammalian fertilization*, REPRODUCTION 144(6):649 (Oct. 1, 2012) (emphasis added).

[10] Marcello et al., *Fertilization*, ADV. EXP. BIOL. 757:321 (2013) (emphasis added).

*of a **new individual** is initiated.*"[11] Further, one scientific textbook similarly explains the following:

> Human development begins at fertilization when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to produce a single cell – a zygote. This highly specialized, totipotent cell marked ***the beginning of each of us as a unique individual***.[12]

Thus, a new human organism is created *before* the developing embryo implants in the uterus – *i.e.*, before that time at which some people consider a woman "pregnant."

Respondents and their *amici* have at times tried to distract from Petitioners' objections to the Mandate by arguing over terminology concerning when "pregnancy" begins rather than when life begins (at fertilization). This semantic gamesmanship fails to respond to the concern that the objected-to drugs and devices can destroy human life after fertilization by blocking the implantation of a developing human embryo. Petitioners conscientiously oppose the voluntary ending of human life at any time following fertilization when such a termination is not necessary to save the life of the mother.

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[11] NIH, *Medline Plus Merriam-Webster Medical Dictionary* (2015), http://www.merriam-webster.com/medlineplus/fertilization (emphasis added).

[12] Moore & Persaud, THE DEVELOPING HUMAN 16 (7th ed. 2003) (emphasis added).

II. Drugs and Devices Defined by the FDA as "Emergency Contraception" Have Post-Fertilization Mechanisms of Action.

Drugs and devices with post-fertilization mechanisms of action are included in the FDA definition of "contraception," including "emergency contraception," even though these drugs and devices may end a developing, distinct human being's life by preventing implantation. For the FDA, the endpoint which defines a drug as a "contraceptive" is the ability to prevent a "pregnancy" – which in operational terms means preventing a positive pregnancy test ten days to two weeks after possible embryo formation. Thus, drugs and devices that interfere with *implantation*, which occurs days *after* fertilization and the creation of a new human organism, are categorized as "contraception."[13]

There is no dispute among the parties that at least some forms of "contraception" have post-fertilization mechanisms of action and can prevent implantation of an already-developing human embryo. For example, in *Burwell v. Hobby Lobby*, this Court noted:

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[13] For an overview of how the definition of "pregnancy" has changed, *see* Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy*, 9 NAT'L CATHOLIC BIOETHICS QUARTERLY 542 (2009).

> [T]he [plaintiffs] have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, may result in the destruction of an embryo.

134 S. Ct. 2751, 2775 (2014) (citation omitted).

This post-fertilization effect is further supported by Dr. James Trussell, who has appeared as an *amicus* supporting Respondents in numerous related cases.[14] In a study on "emergency contraception," he states: "To make an informed choice, women must know that [emergency contraception pills] . . . may at times inhibit implantation. . . ."[15] He has also stated that these post-fertilization effects "should certainly be [acknowledged and] celebrated, because without them the [contraceptive] method would not provide as

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[14] For example, an *amicus* brief of Physicians for Reproductive Health, the American College of Obstetricians & Gynecologists, Dr. James Trussell, and other medical organizations and individuals has been filed in numerous cases. The brief contains semantic arguments, such as when "pregnancy" begins and whether a drug can be considered an "abortifacient." However, the relevant scientific benchmark is when the life of a human organism begins, which undisputedly occurs at fertilization.

[15] Trussell et al., *Emergency Contraception: A last chance to prevent unintended pegnancy* (Office of Population Research at Princeton University June 2010).

much benefit as they do."[16] In other words, if fertilization has occurred, the method provides "benefit" by preventing implantation.

Moreover, a drug classified by the FDA as "emergency contraception" – Ulipristal Acetate (*ella*) – can kill a human embryo *after* implantation. These post-fertilization mechanisms of action demonstrate that "emergency contraception" can end the life of an already-developing human organism.

A. Plan B can prevent implantation.

The FDA approved labeling acknowledges that the "emergency contraception" drug known as Plan B can prevent implantation of an already-developing human embryo.[17] The FDA states on its website, "[i]f fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)."[18] The same explanation is provided by Duramed Pharmaceuticals, the manufacturer of Plan B One-Step.[19]

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[16] Raymond et al., *Embracing post-fertilisation methods of family planning: A call to action*, J. FAM. PLAN. REPROD. HEALTH CARE (2013).

[17] Plan B Approved Labeling, http://www.accessdata.fda.gov/drugsatfda_docs/nda/2006/021045s011_Plan_B_PRNTLBL.pdf.

[18] FDA, *FDA's Decision Regarding Plan B: Questions and Answers* (updated Apr. 30, 2009), http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm.

[19] Duramed Pharmaceuticals, *How Plan B One-Step Works* (2015), http://www.planbonestep.com/HowItWorks.aspx (explaining

(Continued on following page)

Under Respondents' Mandate, Petitioners are forced to arrange for coverage of Plan B, despite its life-ending effect, in violation of Petitioners' genuinely held religious beliefs.

B. Ulipristal Acetate (*ella*) can prevent implantation or kill an implanted embryo.

The chemical make-up of the "emergency contraception" drug Ulipristal Acetate (*ella*), unlike Plan B, is similar to the abortion drug RU-486. Like RU-486, *ella* is a selective progesterone receptor modulator (SPRM), and – "[t]he mechanism of action of ulipristal (*ella*) in human ovarian and endometrial tissue is identical to that of its parent compound mifepristone."[20] By blocking the progesterone – necessary to build and maintain the uterine wall during pregnancy – *ella* can either prevent a developing human embryo from implanting in the uterus, or it can kill an implanted embryo by essentially starving the embryo to death. Thus, regardless of whether "pregnancy" is defined as beginning at fertilization or at implantation, *ella* can abort a pregnancy.[21]

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that Plan B can work by "[p]reventing attachment (implantation) to the uterus (womb)").

[20] Harrison & Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 ANNALS PHARMACOTHERAPY 115 (Jan. 2011).

[21] *See* Gacek, *Conceiving Pregnancy*, *supra*.

Studies confirm that *ella* can harm an embryo.[22] The FDA-approved labeling notes that *ella* may "affect implantation"[23] and contraindicates use of *ella* if pregnancy is known or suspected. A study funded by *ella*'s manufacturer explains that SPRMs, "including ulipristal acetate," can "impair implantation."[24] While the study's researchers theorize that the dosage used in its trial "might be too low to inhibit implantation,"[25] they state affirmatively that "an additional postovulatory mechanism of action," *e.g.*, impairing implantation, "cannot be excluded."

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[22] European Medicines Agency, *Evaluation of Medicines for Human Use: CHMP Assessment Report for Ellaone* 16 (2009), http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Public_assessment_report/human/001027/WC500023673.pdf.

[23] *ella* Labeling Information, http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf.

[24] Glasier et al., *Ulipristal acetate versus levongestrel for emergency contraception: A randomized non-inferiority trial and meta-analysis*, 375 THE LANCET 555 (Jan. 2010).

[25] In the Glasier study, "follow-up was done 5-7 days after expected menses. If menses had occurred and a pregnancy test was negative, participation [in the study] ended. If menses had not occurred, participants returned a week later." Considering that implantation must occur *before* menses, the study could not, and did not attempt to, measure an impact on an embryo prior to implantation or even shortly after implantation. Upon enrollment, participants were given a pregnancy test and pregnant women were excluded from the study. The only criterion for *ella* "working" was that a woman was not pregnant in the end. Whether that was achieved through blocking implantation or killing the embryo after implantation was not determinable.

Dr. Trussell's recent "emergency contraceptives" study further demonstrates *ella*'s potential to destroy a human embryo. An emergency contraceptive "could not be effective on average when started after 96 hours (four days) without a post-fertilization effect; the reason is that with increasing delay, a greater proportion of women would be too near to ovulation."[26] Significantly, Dr. Trussell's study notes that trials of *ella* showed no statistically significant reduced effectiveness for up to 120 hours or five days (the time frame studied).[27]

At the FDA advisory panel meeting for *ella*, Dr. Scott Emerson, a professor of Biostatistics at the University of Washington and a panelist, raised the point that the low pregnancy rate for women who take *ella* four or five days after intercourse suggests that the drug *must* have an "abortifacient" quality.[28]

Thus, contrary to their religious and conscientious beliefs, even with the "accommodation," Petitioners are required to arrange for coverage of *ella* –

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[26] Trussell et al., *Emergency Contraception: A last chance to prevent unintended pregnancy* (Office of Population Research at Princeton University December 2013).

[27] *Id.*

[28] *See* Transcript, Food and Drug Administration Center for Drug Evaluation and Research (CDER), Advisory Committee for Reproductive Health Drugs (June 17, 2010), http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM218560.pdf.

an abortion-inducing drug – under Respondents' Mandate.

C. Intrauterine Devices can also prevent implantation.

Copper Intrauterine Devices (IUDs) are heavily promoted as another form of "emergency contraception" and can block the implantation of a human embryo after fertilization.[29] Dr. Trussell's study on "emergency contraceptives" concludes that "[i]ts very high effectiveness implies that emergency insertion of a copper IUD *must* be able to prevent pregnancy *after fertilization.*"[30] Put another way, IUDs are so effective *because* they do not just prevent conception – they can kill an already-developing human embryo.

Clearly, under Respondents' Mandate, Petitioners are required to arrange for coverage of devices that can kill human embryos, contrary to their religious and conscientious beliefs.

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[29] *See* Department of Health and Human Services, *Birth Control Methods* (updated Nov. 21, 2011), http://www.womenshealth.gov/publications/our-publications/fact-sheet/birth-control-methods.pdf ("If fertilization does occur, the IUD keeps the fertilized egg from implanting in the lining of the uterus.").

[30] *See* Trussell et al., *Emergency Contraception* (2010), *supra* (emphasis added).

III. The Mandate Violates Sincerely Held Religious Beliefs and Freedom of Conscience.

Petitioners have made clear their religious objections to paying or arranging for life-ending drugs and devices. The Mandate's coercive dichotomy – break the law or betray your religious beliefs – violates the U.S. Constitution's guarantee of freedom of conscience.

History, tradition, and jurisprudence affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs – including payment for such an act – and this history, tradition, and jurisprudence unequivocally support the Petitioners.

A. HHS' "accommodation" for religious non-profits requires their compliance with the Mandate.

HHS' own explanation of how the "accommodation" works contradicts its claim that the "accommodated" religious groups "would not contract, arrange, pay, or refer for [the coverage that violates their religious beliefs]." 78 Fed. Reg. 39870, 39878 (2013). The July 2013 final rule clarifies that plan participants and beneficiaries on an accommodated plan do *not* have "two separate health insurance policies." *Id.* at 39876. Rather, the insurance issuer (or third-party administrator (TPA) for self-insured plans) will make what HHS calls "separate payments" for the objectionable coverage. *Id.* at 39874. The same is true for

church plans, except that the government will seek to induce the administrators for these ERISA-exempt plans to comply with its rules.

These payments are directly linked to the insurance plan from which they are supposedly separate. There are no opt-in or opt-out provisions. Payments are automatically made for the "accommodated" plan's participants and beneficiaries and start and end with a person's enrollment in the "accommodated" plan. HHS acknowledges that "issuers typically do not receive enrollee information prior to enrollment." *Id.* at 39881. The relationship between the issuer or TPA making the "separate payments" and the plan enrollees is completely dependent on and related to the supposedly "accommodated" organization's plan.

The July 2013 final rule explained that these payments can be envisioned as "cost neutral" for the insurance issuer "because they would be insuring the same set of individuals under both the group health insurance policies and [the separate payments]." *Id.* at 39877. Even accepting HHS' assumption that providing coverage of contraceptives (use of which is already ubiquitous) without co-pays would result in fewer pregnancies and at least equally lower costs on the "accommodated" group health plan, the math only works if these contraceptive payments are considered in conjunction with the supposedly separate health plan provided by the religious employer.

Under the interim final rule issued in August 2014, the so-called "accommodation" operates exactly the same. HHS explains the change as simply "provid[ing] an alternative process" for "notice of . . . religious objections." 79 Fed. Reg. 51092. That "alternative process" requires handing over the name and contact information "for any of the plan's third party administrators and health insurance issuers." *Id.* at 51098. HHS explains that it will use that information to force the religious employer's health insurance issuer to include the objected-to items and services, or, in the case of a church plan, induce its TPA to do the same. *Id.* The coercive impact on the plan paid and arranged for by the religious employer remains the same and renders the religious employer complicit with arranging coverage for life-ending drugs and devices.

The "accommodation" effectively requires a religious non-profit's cooperation in the arranging and facilitating coverage for the drugs and devices to which it objects. Thus, it substantially burdens religious beliefs in a manner similar to that of the plaintiffs in *Burwell v. Hobby Lobby*. Importantly, this Court held that "[b]y requiring [plaintiffs] and their companies to arrange for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2775.

Notably, HHS has expressly exempted churches and their auxiliaries that have objections similar to those of Petitioners from compliance with the Mandate.

Concurring in *Hobby Lobby*, Justice Kennedy noted that the Religious Freedom Restoration Act "is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers – burdening one while accommodating the other – when it may treat them both equally by offering both of them the same accommodation." *Id.* at 2786 (Kennedy, J., concurring).

Ultimately, it is for Petitioners to determine whether what HHS has styled as an "accommodation" burdens their religious beliefs. This Court squarely addressed this point in *Hobby Lobby*, holding that Petitioners "sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial." *Id.* at 2779. Here, as in *Hobby Lobby*, it is not for Respondents or the courts to determine what "lies on the forbidden side of the line" for Petitioners' religious beliefs regarding complicity with life-ending drugs and devices.

B. Freedom of Conscience is a fundamental right affirmed by our Founders.

The First Amendment guarantees that Congress shall make no law prohibiting the free exercise of religion. U.S. CONST. amend. I. The very root of that

promise is that the government cannot force a person to commit an act in violation of his or her religion.[31]

The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience."[32] Thomas Jefferson was clear that freedom of conscience is not to be subordinate to the government:

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[33]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[34]

Likewise, James Madison, considered the Father of the Bill of Rights, was deeply concerned that the freedom of conscience be protected. Madison stated:

> The Religion then of every man must be left to the conviction and conscience of every

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[31] *See generally* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

[32] The Founders often used the terms "conscience" and "religion" synonymously. Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 310 (2005).

[33] Jefferson, *Notes on Virginia* (1785).

[34] Jefferson, Letter to New London Methodists (1809).

> man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*.[35]

Madison described the conscience as "the most sacred of all property."[36]

Madison understood that if man cannot be loyal to his conscience, then a government cannot expect him to be loyal to less compelling obligations. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law.

George Washington maintained that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle."[37] Washington advised that the law should always extensively accommodate conscience:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection

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[35] Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1785) (emphasis added).

[36] Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

[37] Novak & Novak, WASHINGTON'S GOD 111 (2006); Milton, *supra*.

> and essential interests of the nation may justify and permit.[38]

John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[39] Patriot leader Samuel Adams wrote that the liberty of conscience is an original right.[40]

Forcing Petitioners to arrange for and facilitate coverage for life-ending drugs and devices to which they are conscientiously opposed eviscerates one of the very purposes for which this Nation was formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. *We ought with one heart and one hand hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into . . . tyranny over religious faith. . . .*[41]

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[38] Washington, Letter to the Religious Society Called Quakers (1789).

[39] Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*, in REPORT FROM COMMITTEE BEFORE THE CONVENTION OF DELEGATES (1779).

[40] Cushing, THE WRITINGS OF SAMUEL ADAMS 350-59 (vol. II, 1906).

[41] Jefferson, Letter to Edward Dowse, Esq. (Apr. 19, 1803) (emphasis added).

C. Freedom of Conscience is a fundamental right affirmed by the U.S. Supreme Court.

"Freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (referencing "constitutionally protected freedom of conscience").

This Court has stated that *"[f]reedom of conscience . . . cannot be restricted by law."* *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added). While the "freedom to believe" is absolute, the "freedom to act" is not; however, "in every case," regulations on the freedom to act cannot "unduly infringe the protected freedom." *Id.* at 303-04.

In the 1940s, the Court considered regulations requiring public school students to recite the pledge to the American flag, ultimately vindicating the students' freedom of conscience. In *West Virginia State Board of Education v. Barnette*, the Court stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by

> word or act their faith therein. . . . [L]ocal authorities [may not] transcend [ ] constitutional limitations on their power and invade[ ] the sphere of intellect and spirit which it is the purpose of the *First Amendment to our Constitution* to reserve from all official control.

Barnette, 319 U.S. 624, 642 (1943) (emphasis in original). The Court also stated, "[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.* Based upon these principles, the Court ruled it unconstitutional to force public school children to perform an act that was against their religious beliefs.[42]

The Court has also protected men who were conscientiously opposed to war. In *United States v. Seeger* and *Welsh v. United States*, the Court extended draft exemptions[43] to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they

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[42] *Barnette* has been affirmed on numerous occasions. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[43] Section 6(j) of the Universal Military Training and Service Act exempted men from the draft who were conscientiously opposed to military service because of "religious training and belief." Early colonial charters and state constitutions similarly spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

allowed themselves to become part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970) (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that §6(j) protected persons with "intensely personal" convictions – even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Seeger and Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice." *Id.* at 337. Important here is Welsh's statement:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. . . . I cannot, therefore conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.

Id. at 343.

The holdings in these cases demonstrate a strong commitment by this Court to protect freedom of conscience. Like Welsh, Petitioners believe that human life is valuable – at all stages and in all situations. Being forced to arrange for drugs and devices that terminate a human life is just as objectionable as being forced to participate in the termination of human life in war.

D. Freedom of Conscience is a fundamental right affirmed by Congress.

Congress has passed numerous measures expressing American commitment to protecting the freedom of conscience. Congress passed the first of the Church Amendments following this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973).[44] The original and subsequent Church Amendments protect healthcare providers from discrimination by recipients of HHS funds on the basis of their objection, because of religious belief or moral conviction, to performing or participating in not only abortion but *any* lawful health service or research activity.

In 1996, the Coats Amendment was enacted to prohibit the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refused to, among other things, receive training in abortions, require or provide such training, perform abortions, or provide referrals or make arrangements for such training or abortions.[45]

In 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives.[46] Similarly, in 2000, Congress

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[44] 42 U.S.C. §300-7.

[45] 42 U.S.C. §238n.

[46] *See* Pub. L. No. 108-7, 117 Stat. 11, 472 (1999).

passed a law requiring the District of Columbia to include a conscience clause protecting religious beliefs and moral convictions in any contraceptive mandate.[47]

The Hyde-Weldon Amendment, first enacted in 2005, provides that no federal, state, or local government agency or program that receives funds under the Labor, Health and Human Services (LHHS) appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion.[48] The Amendment is subject to annual renewal and has survived multiple challenges.[49]

Respondents' Mandate ignores the long-standing national commitment to protect the freedom of conscience.[50]

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[47] *See* Pub. L. No. 108-7, 117 Stat. 11, 126-27 (2000).

[48] Pub. L. No. 110-161, §508(d), 121 Stat. 1844, 2209 (2007).

[49] Many similar conscience provisions related to federal funding have been passed over the last 45 years. *See, e.g.*, 42 U.S.C. §1395w-22(j)(3)(B) (1997); 42 U.S.C. §300a-7(e) (1979); 42 U.S.C. §300a-7(c)(2), (d) (1974); 42 U.S.C. §300a-7(b), (c)(1) (1973); 48 C.F.R. §1609.7001(c)(7) (1998); Pub. L. No. 108-25, 117 Stat. 711, 733 (2003).

[50] Respondents' actions also contravene the laws and clear intent of the vast majority of states. *See Rights of Conscience Overview*, in DEFENDING LIFE 2013: DECONSTRUCTING ROE: ABORTION'S NEGATIVE IMPACT ON WOMEN (2013), http://www.aul.org/wp-content/uploads/2013/04/06-Freedom-of-Conscience.pdf.

CONCLUSION

It is undisputed as a matter of science that a new human organism is created at fertilization. Being forced to arrange and facilitate coverage for drugs and devices that can end a human life after fertilization amounts to forced participation in the act of ending that life. Respondents' Mandate and its purported accommodation which requires Petitioners to cooperate in the provision of such drugs and devices comprise a coercive policy which runs contrary to the history, tradition, and jurisprudence of this Nation, violates Petitioners' freedom of conscience, and is, therefore, unconstitutional.

This Court should grant the petition and reverse the lower court.

Respectfully submitted,

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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND SCHOOL SISTERS OF CHRIST THE KING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Department of Health and Human Services (HHS) promulgated regulations under the Affordable Care Act (ACA) requiring employers, through their healthcare plans, to provide at no cost the full range of FDA-approved contraceptives. HHS exempted "churches" and their "integrated auxiliaries" from complying with the mandate but did not grant that exemption to other religious nonprofit organizations that hold the same religious objectives to artificial contraception. HHS's only purported justification for this discriminatory approach was its unsubstantiated assumption that churches and their integrated auxiliaries "that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (emphasis added).

The question presented is:

Do HHS's regulations, which exempt some religious organizations from the contraceptive mandate but require other religious organizations to fulfill their obligations under the mandate (or pay fines), violate the Free Exercise and Establishment Clauses of the First Amendment?

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BRIEF FOR *AMICI CURIAE* CARMELITE SISTERS OF THE MOST SACRED HEART OF LOS ANGELES, RELIGIOUS SISTERS OF MERCY OF ALMA, MICHIGAN, AND SCHOOL SISTERS OF CHRIST THE KING[1]

I. INTEREST OF THE *AMICI CURIAE*

Amici Curiae are Catholic institutes of religious sisters that, following the authoritative teaching of the Catholic Church, believe that use of artificial contraception is a grave moral evil. As set forth below, these sisters express their love and devotion to God through physical acts of charity and compassion: They care for the sick and dying, educate children, feed and clothe the poor, and provide spaces for spiritual refreshment and renewal.

Amici are all religious nonprofit organizations that enjoy the same corporate and religious status as any Catholic diocese, yet they are not considered "religious employers" exempt from the contraception mandate promulgated by the Department of Health and Human Services (HHS) because the government does not consider their expressions of religious belief to be "*exclusively religious activit[y].*" 26 U.S.C. § 6033(a)(3)(A)(iii) (emphasis added); *see* 45 C.F.R. § 147.131(a) ("[A] 'religious employer' is an organization . . . referred to in section 6033(A)(3)(A)(i) or (iii) of the Internal Revenue Code."). HHS's regulations

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. Counsel of record received timely notice of the intent to file this *amicus curiae* brief, and all parties have granted consent to its filing.

thus require *Amici* to implement the contraception mandate either by providing contraceptive coverage to their female employees (45 C.F.R. § 147.130(a)(1)(iv)), or by self-certifying that they are religious organizations that have religious objections to providing contraceptive coverage (*id.* § 147.131(b)(4), 4(c)(1)), which in turn would obligate *amici*'s insurers to provide contraceptive coverage through *amici*'s own health plans (*id.* § 147.131(c)(2)(i)(B)).

Amici believe that implementing the mandate in either way would render them complicit with the provision of contraceptive coverage. But if *amici* do not comply, they will be subjected to punitive fines that will cripple their ability to carry out the faith-based activities that are the fundamental expression of their religious beliefs. 26 U.S.C. §§ 4980D, 4980H.

Carmelite Sisters of the Most Sacred Heart of Los Angeles ("Carmelite Sisters"): The Carmelite Sisters manage and staff three health care facilities for the elderly, two child care centers, and a spiritual retreat center. The Carmelite Sisters' basic mission is to "promote a deeper spiritual life of God's people through healthcare, education and spiritual retreats," and these facilities and centers are the physical expression of their prayers and worship. To provide services to children and the elderly, the Carmelite Sisters operate several subsidiaries that together employ over 300 "co-workers" (people who work alongside the Carmelite Sisters). The Carmelite Sisters have established a single group health plan brokered by Arthur J. Gallagher that provides health insurance benefits for all of their employees.

Religious Sisters of Mercy of Alma, Michigan ("Religious Sisters"): The Religious Sisters operate two health care clinics, and the sisters also teach and work for various dioceses around the country. The Religious Sisters are dedicated to providing comprehensive health care, understood by the Religious Sisters as the care of the entire person (spiritual, intellectual, physical, and emotional). The religious activity of providing care for others, through various activities, such as teaching and health care, is of the nature of and essential to the religious institute. The Religious Sisters are part of the Michigan Catholic Conference's Blue Cross plan, which covers the dioceses and parishes in Michigan.

School Sisters of Christ the King of Lincoln, Nebraska ("School Sisters"): The School Sisters is a religious institute founded to bring about the reign of Christ through the apostolate of Catholic education. The sisters serve as administrators, teachers, and catechists in eight elementary schools in the Diocese of Lincoln. The School Sisters are part of a health insurance plan with Blue Cross Blue Shield of Nebraska through the Catholic Diocese of Lincoln, Nebraska. The diocesan health insurance plan has been specifically contracted for to exclude coverage for purposes of contraception, abortifacients, sterilization, and related services.

II. SUMMARY OF THE ARGUMENT

HHS does not impose the contraception mandate equally on religious organizations. Although some organizations ("churches" and their "integrated auxiliaries") are exempt from the mandate, other religious organizations that have the same religious ob-

jections to providing contraceptive coverage are not. Religious nonprofit organizations that actively serve the community—like *amici*—are forced to implement the mandate. Under HHS's "accommodation," these religious entities may comply either by including contraceptive coverage in their health plans or by filing a form that results in having contraceptive coverage provided under their health plans. If they refuse to comply in one of these two ways, they are subjected to crippling fines that may force them to shut down altogether.

The Court should grant certiorari because the Tenth Circuit decided an important question of federal law in a way that conflicts with decisions of this Court and which will result in First Amendment violations on a massive scale. Because of HHS's regulations, thousands of religious nonprofit organizations face crippling fines that will hinder or eliminate their ability to carry out their faith-based missions. If the Court delays in determining the constitutionality of the HHS regulations, many of these organizations will be forced to close their doors. Furthermore, among all of the petitions this Court has received (and will receive) challenging the contraception mandate, The Little Sisters' petition may be the only case in which the First Amendment challenge is squarely presented.[2] Because The Little Sisters' pe-

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[2] *See* Pet. Cert., *Geneva Coll. v. Burwell*, No. 15-191, 2015 WL 4748954 (Aug. 11, 2015) (presenting question under RFRA, but not First Amendment); Pet. Cert., *S. Nazarene Univ. v. Burwell*, No. 15-119, 2015 WL 4538191 (July 24, 2015) (same); Pet. Cert., *Houston Baptist Univ. v. Burwell*, No. 15-35, 2015 WL 4123412 (July 8, 2015) (same); Pet. Cert., *Roman Catholic Archbishop of Wash. v. Burwell*, No. 14-1505, 2015 WL 3862736

tition also presents a challenge under the Religious Freedom Restoration Act (RFRA), it is an excellent vehicle for considering the full array of challenges to HHS's regulations.

I. The Tenth Circuit's decision rejecting petitioners' free exercise challenge under rational basis review cannot be reconciled with this Court's clear statement that laws that are not neutral and generally applicable must be subjected to strict scrutiny under the Free Exercise Clause if they burden religious practice. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The Tenth Circuit's decision also creates a circuit conflict with the Third Circuit regarding the proper test for determining whether government action is "generally applicable" and thus subject to rational-basis review under the Free Exercise Clause.

HHS's regulations, which substantially burden religious exercise, are subject to strict scrutiny under the Free Exercise Clause because they are neither neutral nor generally applicable. *Lukumi*, 508 U.S. at 531-32. The regulations are not neutral because they facially discriminate between "churches" and other religious nonprofits on the theory that churches predominantly hire people who share their religious beliefs whereas other religious nonprofits do not. In concluding that the regulations are neutral, the Tenth Circuit disregarded this Court's clear

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(June 19, 2015) (same); Pet. Cert., *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 14-1453, 2015 WL 3637475 (June 9, 2015) (same); Pet. Cert., *Zubik v. Burwell*, No. 14-1418, 2015 WL 3486599 (May 29, 2015) (same); *cf.* Pet. Cert., *Mich. Catholic Conference v. Burwell*, No. 14-701, 2014 WL 7166539 (Dec. 12, 2014) (same).

teaching that a law that discriminates on its face is not neutral. *Id.* at 533.

HHS's regulations are not generally applicable because the exemption to the contraception mandate is categorically unavailable to certain types of employers—namely, religious nonprofits that are not considered "churches" or their "integrated auxiliaries" under the tax code. The Tenth Circuit ignored this feature of the regulations because "[n]one of the categorical exemptions enacted by the ACA and its implementing regulations establish a system of individualized objections." Pet. App. 100a-101a n.52. But that restricted view of the "general applicability" requirement squarely conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.), which "reject[ed] the argument that, because the [relevant] exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply." Accordingly, certiorari is warranted to resolve the conflict between the Tenth and Third Circuits and to clarify that strict scrutiny is appropriate when certain religious organizations are categorically excluded from exemptions that are available to other religious organizations.

This petition is an excellent vehicle for resolving this question because the level of scrutiny is dispositive. If strict scrutiny applies, the government must show that it has a compelling interest in forcing religious nonprofit organizations that have religious objections to artificial contraception to implement the mandate. It cannot do so because its single justification for granting the exemption to churches but not to religious nonprofits—the notion that churches hire

people who share their religious convictions whereas religious nonprofits do not—is baseless. Many religious nonprofit organizations hire people who share their religious views, and many churches hire those who do not. HHS cannot steamroll the religious beliefs of disfavored religious organizations by simply inventing (but not substantiating) a supposed distinction in their hiring practices.

Under strict scrutiny, the government would also be required to show that the regulations are narrowly tailored to the government's compelling interest, but it cannot carry this burden either because HHS has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013).

Review is warranted because the Tenth Circuit's decision conflicts with this Court's free exercise jurisprudence, creates a conflict with the Third Circuit, and, if allowed to stand, will violate the free exercise rights of thousands of religious nonprofit organizations.

II. Review is also warranted because the Tenth Circuit's decision upholding regulations that favor purportedly sectarian religious organizations over purportedly ecumenical ones conflicts with the Ninth Circuit's decision in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (per curiam), which held that discriminating among religious organizations on the basis of the assumed pervasiveness or intensity of their religious beliefs violates the Establishment Clause. This Court should grant certiorari to resolve this conflict and erase any doubt that the Establish-

ment Clause forbids the government from favoring more sectarian religious organizations while disfavoring ecumenical religious organizations.

III. ARGUMENT

HHS has exempted some religious organizations—but not others—from the contraceptive mandate. Instead of *exempting* religious orders and any other bona fide religious nonprofits, HHS devised a Rube Goldberg "accommodation" that simply imposes an alternative mechanism for implementing the mandate. *Amici* have strong religious objections to implementing the mandate, whether by providing contraceptive services directly or by submitting the self-certification form or HHS notification that modifies their health plan to provide such coverage. But if *amici* do not comply with the mandate in one of these two ways, they will be subjected to crippling fines. The "accommodation" thus imposes the same burden on *amici*'s exercise of religion as the mandate itself.

The petition for certiorari filed by the Little Sisters of the Poor ably explains why the Tenth Circuit's decision cannot be reconciled with this Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which held that applying the contraception mandate to for-profit institutions with sincere religious objections to artificial contraception violated RFRA. The petition also correctly observes that this Court has thrice used its powers under the All Writs Act to stay the application of HHS's regulations to nonprofit religious employers.

Amici agree that plenary review is warranted for both of those reasons, and they will not repeat peti-

tioners' arguments here. Rather, *amici* seek to focus the Court's attention on the issue raised in petitioners' third question presented: the fundamental First Amendment problem with HHS's arbitrary distinction between churches and other religious nonprofits—a distinction that strongly favors the rights of some religious organizations over others. Simply stated, HHS does not extend the exemption to religious orders that the government deems insufficiently "religious." 26 C.F.R. § 1.6033-2(g)(ii); *see also* 45 C.F.R. § 147.131(a).

As a result of this discriminatory scheme, a church is exempt from the mandate even if it operates a child care center or assisted living facility, but a religious order of nuns operating the same type of facilities is not. Similarly, a church that hires hundreds of individuals who do not share the church's religious objection to contraception would be exempt from the mandate, while a religious order that hires predominantly employees of the same faith who share its objection would not. By drawing arbitrary distinctions between churches and other religious nonprofit organizations that hold equally sincere religious objections to the contraception mandate, HHS has violated both the Free Exercise Clause and the Establishment Clause of the First Amendment.

If left intact, the Tenth Circuit's decision will put countless religious nonprofits to the choice of either violating their firmly held religious beliefs or paying devastating fines that will force them to cease performing their faith-based works of charity. The constitutional questions in this case are thus of the utmost importance both to the religious nonprofits affected by HHS's onerous regulations and to the peo-

ple they serve. Accordingly, this Court should grant the petition for review.

The Tenth Circuit's decision, which upheld HHS's regulations against petitioners' constitutional challenges, has also created two separate circuit conflicts: First, the Tenth Circuit disagreed with the Third Circuit regarding the proper test for determining whether government action is "generally applicable" and thus subject to rational-basis review under the Free Exercise Clause. Second, the court below reached a different conclusion from the Ninth Circuit regarding the constitutionality of government action that favors sectarian organizations over ecumenical organizations. Review is needed to resolve these circuit conflicts and to bring clarity to the law in this important area.

A. HHS's Exemption And "Accommodation" Violate The Free Exercise Clause

This Court has held that laws burdening religious practices that are not "neutral and of general applicability . . . must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). As petitioners' brief demonstrates, the "accommodation" burdens the religious practice of religious organizations like *amici*. Strict scrutiny is thus required because HHS's regulations are neither neutral nor generally applicable. The government cannot satisfy strict scrutiny because even if HHS had a compelling interest in ensuring access to free contraceptive coverage—which it does not—HHS has failed to show that its regulations are narrowly tai-

lored to any such interest. HHS's regulations thus violate the free exercise rights of *amici* and thousands of similarly situated religious nonprofit organizations. The Tenth Circuit's decision to the contrary cannot be reconciled with this Court's Free Exercise precedents.

1. The Exemption And "Accommodation" Are Neither Neutral or Generally Applicable

The "minimum requirement of neutrality is that a law not discriminate on its face." *Lukumi*, 508 U.S. at 533. The contraceptive mandate scheme fails this fundamental requirement of neutrality because HHS's implementing regulations discriminate on their face between different types of religious organizations. *See Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982) (a law that makes "explicit and deliberate distinctions between different religious organizations" is "not . . . a facially neutral statute"). Specifically, "churches" and "their integrated auxiliaries" are exempt from the contraceptive mandate, while other religious organizations—some of which engage in the same activities (such as healthcare and child care), share the same religious convictions, seek the same relief, and provide health benefits in the same ways—are not. *See* 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i). As a result, only churches and their integrated auxiliaries are free to follow their religious convictions when providing health care to their employees. HHS thus explicitly privileges the religious exercise of some religious organizations over the religious exercise of organizations like *amici* that express their religious beliefs through activities

the government does not consider "exclusively religious." 26 U.S.C. § 6033(a)(3)(A)(iii).

Indeed, HHS did not even pretend that the regulations are neutral. Rather, it explicitly declined to extend the exemption to organizations that it perceived to be ecumenical. *See* 78 Fed. Reg. 39,870, 39,874 (July 2, 2013) (asserting that "Houses of worship . . . that object to contraceptive coverage on religious grounds are more likely . . . to employ people of the same faith who share the same objection"). Although HHS has never disputed that these organizations have sincere religious objections to providing artificial contraception to their employees, HHS deliberately crafted its regulations to compel them to implement the mandate. By withholding the exemption from religious nonprofits on the basis of their perceived ecumenism, HHS violated the bedrock "governmental obligation of neutrality in the face of religious differences." *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

The Tenth Circuit, after noting that the *mandate* was facially neutral with regard to employers, brushed aside the neutrality requirement for the *exemption* because, in its view, the substitute accommodation "was developed to facilitate the free exercise of religion, not to target religious groups or burden religious practice." Pet. App. 99a. But HHS's supposedly benign motive is not dispositive of the neutrality question. *Cf. Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." (cita-

tion omitted)). Whatever HHS's motive, the regulations discriminate between religious organizations on their face, suppressing the religious exercise of religious organizations like *amici*, and thus are not neutral.[3]

This Court has held that "in circumstances in which individualized exemptions from a general re-

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[3] The Tenth Circuit's decision touches on a well-developed circuit conflict over whether strict scrutiny is required under *Lukumi* only if a law singles out religious conduct for adverse treatment (*i.e.* the law has a discriminatory motive), or whether strict scrutiny is required whenever a law treats a substantial category of nonreligious conduct more favorably than similar religious conduct. The First, Second, Fourth, and Eighth Circuits have embraced the former position—holding that the plaintiff must prove that the law targets conduct for uniquely adverse treatment "*because of* [its] religious motivation." *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 561 (4th Cir. 2013) (emphasis added); *see also Strout v. Albanese*, 178 F.3d 57, 65 (1st Cir. 1999); *Skoros v. City of N.Y.*, 437 F.3d 1, 39 (2d Cir. 2006); *Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) ("Absent evidence of an intent to regulate religious worship, a law is a neutral law of general applicability." (citation and quotation marks omitted)). By contrast, the Third, Sixth, Tenth, and Eleventh Circuits have maintained that motive is irrelevant. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.); *Ward v. Polite*, 667 F.3d 727, 738-40 (6th Cir. 2012) (Sutton, J.); *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) ("[T]he Free Exercise Clause is not confined to actions based on animus."); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1234 n.16 (11th Cir. 2004) ("Under *Lukumi*, it is unnecessary to identify an invidious intent in enacting a law."). Although the conflict is not directly implicated here because HHS's regulations are facially discriminatory, this petition presents the Court with an opportunity to clarify the "neutrality" and "general applicability" requirements.

quirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason'" under the Free Exercise Clause. *Lukumi*, 508 U.S. at 537 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990)); *see also Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion) ("If a state creates . . . a mechanism [for exemptions], its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent."); *Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (discriminatory application of city ordinance against one religious group violated First Amendment because other religious groups were exempt).

The Tenth Circuit held that this *Smith/Lukumi* rule was inapplicable here because "[n]one of the *categorical* exemptions enacted by the ACA and its implementing regulations establish a system of *individualized* objections." Pet. App. 100a-101a n.52 (emphasis added). That holding squarely conflicts with the Third Circuit's decision in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.), which expressly "reject[ed] the argument that, because the [relevant] exemption is not an 'individualized exemption,' the *Smith/Lukumi* rule does not apply." The Third Circuit explained that, although "the Supreme Court did speak in terms of 'individualized exemptions' in *Smith* and *Lukumi*," the Court's concern about devaluing certain religious motivations "is only *further implicated* when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection

but not for individuals with a religious objection." *Id.* (emphasis added).

Under *Fraternal Order*, the implementing regulations' categorical exemption for certain religious organizations but not others makes the exemption and accommodation scheme *even more* suspect under the Free Exercise Clause than a scheme of individualized exemptions. And because the *Smith/Lukumi* rule requires a compelling reason for such a distinction, the Tenth Circuit exacerbated the circuit conflict by applying rational-basis review to petitioners' Free Exercise challenge. *Compare* Pet. App. 100a-104a (applying rational basis to petitioner's challenge to HHS's categorical refusal to grant exemption to religious nonprofits), *with Fraternal Order*, 170 F.3d at 365-66 (applying strict scrutiny to the government's categorical refusal to provide religious exemptions).

2. The Government Has No Compelling Interest In Forcing Religious Nonprofits To Implement The Mandate

Certiorari is especially appropriate because the government cannot satisfy the demands of strict scrutiny. Accordingly, if this Court determines that HHS's regulations violate the principles of neutrality and general applicability, the Tenth Circuit's decision cannot stand.

By exempting churches and their integrated auxiliaries from the contraception mandate, HHS has effectively conceded that it has no compelling interest in requiring those organizations to provide contraceptive coverage. 45 C.F.R. § 147.131(a). Yet HHS purports to have such an interest in requiring

religious nonprofits that hold precisely the same religious beliefs to implement the mandate via the so-called "accommodation." HHS has offered only one justification for denying the exemption to these organizations:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. at 39,874.

In other words, HHS believes that its interest in requiring churches to implement the mandate is not compelling because employees of churches with religious objections would not use artificial contraception even if it were provided. Conversely, HHS believes that its interest in requiring other religious nonprofits, like *amici*, to implement the mandate is compelling because employees of those organizations *would* use artificial contraception if provided.[4] HHS's reliance on this assumed difference in hiring practices is especially puzzling in light of its decision

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[4] *Amici* assume *arguendo* that the government has a compelling interest in ensuring access to cost-free contraceptive coverage. As petitioners have noted, however, the contraception mandate does not apply to employers with fewer than 50 employees or to those with grandfathered health plans. The government's willingness to let millions of employees receive health insurance that does not include cost-free contraceptive coverage severely undermines any claim that it has a compelling interest in providing such coverage.

to remove the requirement that a "religious employer" must "primarily employ[] persons who share its religious tenets." *Compare* 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012), *with* 78 Fed. Reg. at 39,873-74 (July 2, 2013). Indeed, only nine days before the Little Sisters filed their petition, HHS conceded that "[h]iring coreligionists is not itself a determinative factor as to whether an organization should be accommodated or exempted from the contraceptive requirements." 80 Fed. Reg. 41318, 41325 (July 14, 2015).

More problematically, HHS's rationale for denying the exemption to religious nonprofits is entirely contrived. To be sure, some of the public comments filed in HHS's rulemaking suggest that non-exempt religious employers hire people outside their faith. *See, e.g.*, Comment on the Centers for Medicare Medicaid Services Proposed Rule: Coverage of Certain Preventive Services under Affordable Care Act, CMS-2012-0031-141017 (May 9, 2013) ("Catholic and other religious institutions such as hospitals, colleges and charities often . . . hire non-Catholic employees"). A review of the administrative record revealed no comments, however, suggesting that houses of worship or their auxiliaries hire only employees of the same faith or even that they hire a greater proportion of such employees.[5]

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[5] HHS also ignores that, under its own (flawed) reasoning, the burden on religious exercise imposed by the regulatory scheme would be *greater* for nonprofit religious organizations like *amici*. If nonprofit religious organizations hire a greater proportion of people who do not share their religious beliefs, the organizations' health plans would be more likely to distribute contraceptives to covered employees, thus increasing the degree

Not only is there zero empirical support for the assumption that "houses of worship" hire only (or even mostly) people of the same religious beliefs, but there are myriad examples that refute the assumption. For example, the Archdiocese of Los Angeles employs thousands of people to work in its parishes and schools, but does not require its employees to be devout Catholics or to affirm the Church's moral teachings on contraception. Rather, the Archdiocese expects only that "Archdiocesan employees [will] conduct themselves according to the goals and mission of the Church *in performing their work*." *See* http://www.la-archdiocese.org/jobs/Pages/default.aspx (emphasis added). An individual does not need to be Catholic, much less agree with the Church's teaching on contraception, to conduct herself in accordance with the Church's goals and mission *while at work*.

Not surprisingly, many of the job listings posted by the Archdiocese do not require the applicant to be a practicing Catholic. *Id.* For example, on August 7, 2015, the Cathedral of Our Lady of the Angels, the seat of the Archbishop of Los Angeles, posted a job for a Full Charge Bookkeeper. *See* http://www.la-archdiocese.org/SitePages/Job%20Detail.aspx?ItemID=3470, last visited Aug. 7, 2015. The job requirements included a minimum of five years of professional accounting experience and a bachelor's degree in accounting, finance or related field. The job listing did *not* require applicants to profess the Catholic faith or affirm the Church's moral teachings. In fact, the general Employment Application Form for

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to which the religious nonprofit organizations perceive themselves complicit in moral evil.

the Cathedral of Our Lady of the Angels says only that the Cathedral "can favor Catholic applicants and co-workers in all employment decisions," which necessarily implies the Cathedral's willingness to hire non-Catholics. http://www.olacathedral.org/jobs/Employment_Application.pdf (emphasis added). Indeed, the form does not even ask applicants to identify their religion or religious beliefs. *Id.*

And even if the Archdiocese exercised its prerogative to hire Catholic applicants, an applicant's simple profession of the Catholic faith does not prove that the applicant agrees with or follows the Church's moral teaching on contraception. Thus, even if the Archdiocese hired self-identified Catholics exclusively, it would have no assurance that its health plan was not being used to facilitate the distribution of contraceptives. Forcing the Archdiocese, and other houses of worship, to comply with the contraception mandate would thus result in a substantial burden on their exercise of religion, which is why HHS has exempted them from the mandate altogether. But religious nonprofit organizations that are morally opposed to providing contraception for religious reasons are in precisely the same position. The distinction that HHS has drawn between "churches" and other religious organizations is thus constitutionally indefensible.

3. The Exemption And "Accommodation" Are Not Narrowly Tailored

If the interests identified by the government "could be achieved by narrower [regulations] that burdened religion to a far lesser degree," the government has violated the Free Exercise Clause.

Lukumi, 508 U.S. at 546. Here, HHS has "many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). For example, it could treat employees of religious nonprofits as it treats employees of exempted "religious employers" by providing subsidized contraceptive coverage on the exchanges. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368 (D.C. Cir. 2015), slip op. 17 (Kavanaugh, J., dissenting from denial of rehearing en banc).

* * *

Given the substantial likelihood of wholesale constitutional violations, this case presents an issue of extreme importance that warrants review by this Court. In addition, this Court should grant certiorari to resolve the conflict between the Tenth and Third Circuits and bring needed clarity to this important area of the law.

B. HHS's Exemption And "Accommodation" Violate The Establishment Clause

The HHS regulations also violate the Establishment Clause because they have the effect of conferring an advantage on those religious organizations that HHS perceives to be more intensely religious—*i.e.*, organizations that engage primarily in worship and prayer and that predominantly hire people who share their religious convictions—while disadvantaging those organizations that engage in broader reli-

gious ministries.[6] Whereas "churches" and their "integrated auxiliaries" are allowed to practice their faith freely, other religious organizations are forced to choose between violating their faith and incurring significant penalties. Thus, through its exemption and accommodation scheme, HHS grants the religious beliefs of churches greater dignity than the religious beliefs of other faith-based organizations.

The government itself has argued in the past that such distinctions violate the Establishment Clause. *See* United States Amicus Br. at 11, *Spencer v. World Vision, Inc.*, No. 08-35532, 2008 WL 5549423 (9th Cir. 2008) (arguing that discriminating between churches and other nonprofit religious organizations "would create a serious Establishment Clause problem"). As the government explained, "[t]o allow houses of worship to engage in religious-based employment practices, but deny equal privileges to other, independent organizations that also have sincerely held religious tenets would unlawfully discriminate among religions, and give the former group a competitive advantage in the religious marketplace." *Id.*

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[6] HHS's distinction fails to account for the fact that religious organizations like *amici* view educating children "with the heart and mind of Christ" and caring for the elderly as religious activities that flow directly from their expression of the love of God. *See, e.g.*, James 1:27 ("Religion that is pure and undefiled before God and the Father is this: to care for orphans and widows in their affliction . . . .") (NABRE translation). Nevertheless, because the government does not view these activities as "exclusively religious" (26 U.S.C. § 6033(a)(3)(A)(iii)), it has chosen to deny the exemption to religious nonprofits that perform them (45 C.F.R. § 147.131(a)).

The Ninth Circuit agreed, holding that Title VII's exemption for religious employers was available to any entity "organized for a religious purpose [that] is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts." *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2010) (per curiam). As Judge O'Scannlain explained, "interpreting [a] statute such that it requires an organization to be a 'church' to qualify for [an] exemption would discriminate against religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." *Id.* at 728 (O'Scannlain, J., concurring); *see also id.* at 741 (Kleinfeld, J., concurring) ("I concur in Parts I and II of Judge O'Scannlain's concurrence."). Such discrimination "would also raise the specter of constitutionally impermissible discrimination between institutions on the basis of the 'pervasiveness or intensity' of their religious beliefs." *Id.* at 728 (O'Scannlain, J., concurring) (internal citations omitted); *see also University of Great Falls v. NLRB*, 278 F.3d 135, 1342 (D.C. Cir. 2002) ("an exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns—discriminating between kinds of religious schools"); *Columbia Union College v. Clarke*, 159 F.3d 151, 172 (4th Cir. 1998) (Wilkinson, J., dissenting) ("The denial of state aid to only certain types of religious institutions—namely, pervasively sectarian ones . . . directly violate[s] a . . . core principle of the Establishment Clause, the requirement of nondiscrimination among religions").

Here, although the "pervasiveness or intensity" of religious belief—as manifested in an organization's hiring practices—is the *asserted basis* for the distinction between churches and other religious organizations, the Tenth Circuit found no Establishment Clause violation. The Tenth Circuit reasoned that the distinction was constitutional because "[e]xempting churches while requiring other religious objectors to seek an accommodation is standard practice under the tax code." Pet. App. 104a-105a. That argument is a non sequitur, because the distinction in the tax code does not force non-exempt religious organizations to violate their faith. By contrast, the distinction that HHS has drawn allows certain religious organizations to abide by their faith but requires other religious organizations to choose between violating their faith and incurring significant penalties. Moreover, the Tenth Circuit's concern (Pet. App. 106a) that forbidding the distinction drawn here might call into question any limitations on the scope of religious exemptions is misplaced, because HHS could instead have drawn a clear and constitutional boundary around the exemption by granting it only to organizations with sincere religious objections to providing contraceptive coverage.

Accordingly, plenary review is warranted both to resolve the conflict between the Ninth and Tenth Circuits and to make clear that the government may not put its thumb on the scale by favoring more sectarian organizations over ecumenical ones.

IV. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 24, 2015

No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of The Catholic Benefits Association and The Catholic Insurance Company, as *amici curiae* in support of Petitioners

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INTERESTS OF AMICI CURIAE[1]

Amici are **The Catholic Benefits Association** ("CBA") and its wholly-owned subsidiary, **The Catholic Insurance Company** ("CIC"). The CBA is an Oklahoma non-profit limited cooperative association committed to assisting its Catholic employer members in providing health coverage to their employees consistent with Catholic values. The CBA provides such assistance through its website, training webinars, legal and practical advice for member employers, and litigation services protecting members' legal and conscience rights. One example of such services is the CBA's white paper on "The Mechanics and Effects of the Accommodation" published on its website at http://www.catholicbenefitsassociation.com/cbn/en/resources/effects-of-accommodations-exhibits.pdf. The CBA's 707 member-employers include Catholic dioceses, schools, colleges, social services agencies, hospitals, senior housing, and closely held for profit employers. One of the conditions of membership is that the member must affirm that its health care coverage complies with Catholic values.

The CIC provides stop-loss insurance and arranges for provider networks and third party administration for CBA members with self-funded plans.

Because of the CBA's and the CIC's daily interactions with health care insurers, benefits

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

consultants, third party administrators, and many types of Catholic employers, they have developed substantial familiarity with the Affordable Care Act, its mandate that employer plans must include coverage for contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling ("CASC Mandate"), the religious employer exemption, the so-called accommodation, the ruinous fines for violation of the Mandate, ERISA, and other federal laws.

The CBA's bylaws require it to have "an Ethics Committee comprised of the Catholic bishops serving on [its] board plus any additional number of Catholic bishops as appointed by the committee." This committee has exclusive authority to determine that the CBA's and the CIC's benefits, products, and services conform to Catholic values and doctrine. Its members, from inception to today, are the Catholic archbishops of Baltimore, Oklahoma City, Philadelphia, and Seattle.

On September 12, 2014, shortly after the government adopted its "augmented accommodation," the CBA Ethics Committee unanimously approved this resolution:

> That the use of contraceptives, abortion-inducing drugs and devices, sterilization, and counseling in support of such options ("CASC services") is contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with the government's CASC mandate, with the accommodation provided to "eligible employers," or with the "augmented accommodation"—unless such an employer

has exhausted all alternatives that do not effect a greater evil and unless such an employer has taken reasonable steps to avoid giving scandal.

SUMMARY OF ARGUMENT

Imagine a law that requires a property owner, in time of war, to unlock his or her gate so soldiers can enter the property to launch artillery at the enemy. One such owner is a Jehovah's Witness who, for religious reasons, objects to this and to the conscription of his or her property in service to the war effort. In response, the government, purporting to accommodate the property owner, offers this: instead of unlocking the gate, the Witness must give the key to a neighbor, and the neighbor is required to open the gate. Would this satisfy the property owner's conscience? Of course not. Most Jehovah's Witnesses "conscientiously object to serving in the military, or in any civilian capacity which fosters or supports the military."[2] Even under the offered "accommodation," the Witness still must hand over his key, and his property is still commandeered for the purpose of killing human beings.

The central premise of the Court of Appeals decisions to date is that the accommodation separates the religious employer from the delivery of CASC benefits to employees and puts the duty to cover those benefits on someone else. The courts characterize the accommodation as an "opt out," and

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[2] See Center on Conscience and War, *Jehovah's Witnesses*, http://www.centeronconscience.org/component/content/article.html?id=225:jehovahs-witnesses.

as the Tenth Circuit put it, "opting out . . . relieves [employers] from complicity." *Little Sisters of the Poor* v. *Burwell*, Nos. 13-1540, 14-6026, 14-6028, 2015 WL 4232096 at *16 (10th Cir. July 14, 2015). But the premise is fundamentally flawed. The accommodation is not an opt out, and under both the original mandate and the regulatory "accommodation," the employer remains inextricably tied to the delivery of CASC benefits.

The reason lies in the ACA. The ACA imposes its Mandate on an employer's "group health plan." Under federal law, employee benefits plans, including group health plans, belong to the employer. It is the employer's plan, established and maintained for the benefit of the employer's employees. ERISA sets forth what a plan is, how it is established, and how it is operated. Critically, ERISA makes clear that it is only the employer who can establish a plan, define its basic terms, and subsequently amend it. Church plans that are exempt from ERISA operate no differently.

The ACA statutory mandate, coupled with HRSA's guidelines, requires each petitioner's "group health plan" to cover CASC services. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) establishes that this mandate, standing alone, imposes a substantial burden on petitioners' religious exercise. But the Department of Justice has argued, and the Courts of Appeals have accepted, that the accommodation removes this obligation from the petitioner-employers and places it on a third party—a third party administrator ("TPA"). That is simply wrong. The accommodation does not operate that way. Indeed, it cannot. Under the ACA, the only way employees have access to CASC benefits is

through their employer's plan. Although the accommodation may shift to a third party the duty to pay for these benefits, the fundamental obligation to provide the benefits remains on the employer, and more precisely, on the employer's plan. Employees have access to CASC benefits only because they are participants in the plan, and they cease to have access when they cease to be participants (e.g., when their employment ends). Furthermore, insurers and TPAs become obligated to pay for CASC benefits under the accommodation only because they have preexisting contractual or fiduciary obligations to the plan.

The plan, then, is central to the ACA's mandate scheme. The employer establishes a group health plan, the ACA requires the plan to cover CASC services, and the accommodation does nothing to alter that requirement. Even if an employer invokes the accommodation, employees will receive CASC benefits because they participate in the plan, and third parties must pay for those benefits because of their relationship to the plan.

Petitioners here are saying: this is too much. Catholic and evangelical Protestant employers object to both the statutory mandate and the regulatory accommodation on grounds of moral complicity. In their view, the government has co-opted something they established and maintain for the good of employees into vehicles for the delivery of items they find morally evil.

And the accommodation, far from relieving employers of this complicity, worsens it. The original accommodation requires an employer to execute a document called EBSA Form 700. Buried in the final

sentence of the form are these words: "This form . . . is an instrument under which the plan is operated." After the August 2014 "augmentation" of the accommodation, employers are now told that either "[t]his form or a notice to the Secretary [of HHS] is an instrument under which the plan is operated." See *infra*, Appendices at 3a, 7a.

This concept—a "plan instrument"—originates in ERISA. ERISA requires all plans to be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). That instrument must also specify the formal procedures for amending the plan and the person with authority to make such amendments. Under ERISA, only the employer or its designee can execute the plan instruments necessary to establish or amend a plan. The government cannot do this for an employer. That is why, under the "accommodation," the government informs employers that, whether they send the form to their TPA or a notice to HHS, they are creating a new plan instrument. Such a notice is a plan modification masquerading as an opt out.

For the accommodation to comply with the ACA, the government had to find some way to cause the employer to amend its plan to cover CASC services. That is the hidden purpose and actual legal effect of the notice to the TPA. The government has never been forthright about this in its briefing to the Courts of Appeals, and the Courts of Appeals have ignored it entirely. Indeed, Judge Posner, author of the first Court of Appeals decision, bends over backwards to avoid these inconvenient facts. In *Wheaton College* v. *Burwell*, 791 F.3d 792, 800 (7th Cir. 2015), he invents a concept he calls a "governmental plan instrument" and suggests that,

when an employer invokes the accommodation, "[w]hat had been [the employer's] plan, so far as emergency contraception was concerned, the Affordable Care Act ma[kes] the government's plan." Even the government has not gone that far. Nothing in the ACA authorizes the government to do what Judge Posner suggests, and it is simply not the law.

Because the CASC Mandate operates on the employer's plan, the petitioner-employers here are inextricably linked to the delivery of CASC services to their employees, even under the accommodation. And because petitioners' faith teaches that their health plans cannot be made the vehicles for delivering such services, the CASC Mandate imposes a substantial burden on their religious exercise. The Courts of Appeals have fundamentally erred by misunderstanding this; by ignoring the ACA's plan-centric mandate scheme; and by finding that the line the petitioners "drew was an unreasonable one." See *Hobby Lobby*, 134 S. Ct. at 2778 (quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)) (internal quotation marks omitted). This Court's review is therefore critical. These errors must be corrected, and this burden on petitioners relieved.

ARGUMENT

I. This case is extraordinarily important because its resolution will help resolve an unprecedented conflict between the government and a large segment of the religious community.

Never in American history have so many ministries concluded that compliance with a

government regulation so burdens their religious exercise that they must seek judicial protection of their religious liberty. To date, there are at least fifty-seven lawsuits filed—including two by *amici*—seeking relief for Catholic and evangelical Protestant ministry employers.[3] In the two cases brought by *amici* alone, the religious liberty interests of over 700 Catholic employers are at stake.

The large number of cases bear witness to the burden the CASC Mandate and the accommodation place on these ministries' religious exercise. They also point to the fact that the initial decision of the Seventh Circuit infected the analysis and holdings of other Courts of Appeals, including the Tenth Circuit, on an important question of federal law that has now been repeatedly decided in conflict with federal statutes and the decisions of this Court.

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[3] See The Becket Fund, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/.

II. The Courts of Appeals fundamentally misunderstand how the accommodation commandeers ministries' plans.

A. The Courts of Appeals have incorrectly concluded that the accommodation works independently of employers' group health plans.[4]

The appellate decisions denying that the accommodation burdens the religious exercise of self-funded ministry employers rest on the unfounded assertion that, after a self-insured employer submits the form or notice, the government has authority to require a TPA to deliver CASC services outside the objecting employer's group health plan.

The most aggressive proponent of this position is Judge Posner, who has authored all three accommodation decisions in the Seventh Circuit.[5] The Seventh Circuit was the first to label the accommodation an "opt out," *Notre Dame I*, 743 F.3d

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[4] *Amici*'s analysis here focuses exclusively on the burden the CASC Mandate imposes on employers like the Little Sisters of the Poor with self-funded plans. To the extent that the Mandate also falls on "health insurance issuer[s]," it burdens the religious exercise of employers buying group insurance by depriving them of any option that excludes CASC services. See, e.g., *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925) (law effectively foreclosing option of private school education violates fundamental right of parents); *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (federal statute that prohibits importation of drink used by religious group violates Religious Freedom Restoration Act).

[5] *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014) ("*Notre Dame I*"), *vacated and remanded*, 135 S. Ct. 1528 (2015); *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015) ("*Notre Dame II*"); *Wheaton Coll.*, 791 F.3d 792.

at 550, a phrase invoked repeatedly by five other circuits.[6]

Judge Posner called the accommodation an "opt out" because, under his reading, the government can compel a TPA to provide CASC coverage independently of the objecting employer's group health plan and, therefore, without burdening the employers' religious exercise. Notre Dame argued that its plan remained a "conduit" of contraception coverage, but the Seventh Circuit said no: "under the [Affordable Care] Act the government . . . uses private insurance providers and health plan administrators as its agents to provide medical services. . . ." *Notre Dame II*, 786 F.3d at 615. It is "the federal government" that "determines (enlists, drafts, conscripts) substitute providers." *Id.* at 614. "*This coverage is separate from Notre Dame*," Judge Posner said, and "the university has stepped aside." *Id.* at 612.

This novel theory is developed further in Judge Posner's *Wheaton College* decision: "What had been Wheaton's plan, so far as emergency contraception was concerned, the Affordable Care Act made the government's plan when Wheaton refused to comply with the Act's provision on contraception coverage." *Wheaton Coll.*, 791 F.3d at 800. Under the accommodation, the Seventh Circuit asserts, "new

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[6] *Little Sisters of the Poor*, 2015 WL 4232096, *passim* (44 times); *Priests For Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 235 (D.C. Cir. 2014); *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 438 (3d Cir. 2015); *Catholic Health Care Sys.* v. *Burwell*, ___ F.3d ___, 2015 WL 4665049, at *2 (2d Cir. Aug. 7, 2015); *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, slip op. at 17 (6th Cir. Aug. 21, 2015).

contracts are created," through "governmental plan instrument[s],"[7] "to which [objecting employers are] not a party." *Id.* at 796, 800. Because the CASC coverage is supposedly provided through the "government's plan," we are told "the government isn't using the college's plans" at all. *Id.* at 800-01. Judge Posner pronounces these conclusions without legal support.

Other courts have followed the Seventh Circuit down this path, uncritically accepting the notion that the government can compel delivery outside objecting employers' group health plans. See, e.g., *Priests for Life*, 772 F.3d at 253 ("[C]ontraceptive services are not provided to women because of Plaintiffs' contracts with insurance companies . . . ."); *Geneva Coll.*, 778 F.3d at 438 n.13 (the provision of contraceptive coverage under the accommodation "is not dependent upon Geneva's contract with its insurance company"); *E. Tex. Baptist Univ.* v. *Burwell*, __ F.3d __, 2015 WL 3852811 at *7 (5th Cir. June 22, 2015) ("The government is requiring . . . third-party administrators to offer [CASC coverage] separately from the plans . . . ."); *Mich. Catholic Conference*, Nos. 13-2723, 13-6640, slip op. at 17 ("[T]he eligible organization's health plan does not host the coverage.").

The Tenth Circuit, also invoking no legal authority for its conclusions, has joined the appellate chorus, holding that, under the accommodation, the Little Sisters of the Poor's "only involvement in the scheme is the act of opting out"; that the

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[7] The phrase "governmental plan instrument" does not appear in federal law or regulations and has never before appeared in a published court opinion.

accommodation "shift[s] responsibility to non-objecting entities"; and that "[o]pting out ensures they will play no part in the provision of contraceptive coverage." *Little Sisters of the Poor*, 2015 WL 4232096 at *24, *30.

In finding that the accommodation causes a TPA to provide CASC coverage outside the employer's plan, the Tenth Circuit and the other Courts of Appeals have fundamentally misunderstood the plan-centric character of the CASC Mandate and ERISA.

B. The ACA imposes the CASC Mandate on employer's group health plans.

The ACA imposes the CASC Mandate[8] on "group health plans."[9] 42 U.S.C. § 300gg-13(a)(4). The HHS, IRS, and DOL regulations do so as well.[10]

It is critical to understand that only employers can establish and maintain group health plans. The Public Health Service Act ("PHS Act") defines "'group health plan' as an *employee* welfare benefit plan [as defined in ERISA § 3(1), codified at 29 U.S.C. § 1002(1)] to the extent that the plan provides medical care . . . to *employees* or their dependents." 42 U.S.C. § 300gg-91(a)(1) (emphases added).

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[8] The statute refers to "preventive care and screening for women . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." The HRSA subsequently defined such preventive care as including CASC services.

[9] While the ACA also imposes the CASC Mandate on "health insurance issuer[s]," that portion of the Mandate is not at issue here. See *supra* note 4.

[10] 45 C.F.R. § 147.130(a)(1)(iv); 26 C.F.R. § 54.9815-2713T(a)(1)(iv); 29 C.F.R. § 2590.715-2713(b)(1).

ERISA governs "*employee* welfare benefit plans," which it defines as "any plan, fund or program . . . established or maintained *by an employer* . . . for the purpose of providing for its participants or their beneficiaries . . . medical . . . care or benefits." 29 U.S.C. § 1002(1) (emphases added).

The Internal Revenue Code ("Code") similarly defines a group health plan as "a plan (including a self-insured plan) of, or contributed to by, an *employer* . . . to provide health care (directly or otherwise) to the *employees*, former *employees*, . . . or others associated or formerly *associated with the employer*." 26 U.S.C. § 5000(b)(1) (emphases added).

Because only employers have group health plans, the penalty for failing to comply with the CASC mandate—$36,500 per covered employee per year—is imposed on the employer that maintains a CASC-free "group health plan." 26 U.S.C. § 4980D(a), (b)(1), (e)(1). Because delivery of CASC services can be accomplished only through an employer's plan, the accommodation regulation requires self-insured employers to "contract[] with one or more third party administrators" that will serve as the employer's surrogate in providing the services the employer considers morally objectionable. See 26 C.F.R. § 54.9815-2713A(b)(1)(i). Absent an employer in continuing contractual relationship with a TPA, no accommodation is possible because there is no one to receive the Form 700 or the notice from DOL and no one to provide CASC coverage.[11]

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[11] One of the oddest provisions in the ACA regulations suggests the government's solicitude for the conscience of TPAs. The regulations permit a TPA to walk away from its contractual obligation to an employer upon learning that it must provide

The availability of CASC coverage begins and ends with an employee's employment relationship. The employer has no obligation to provide CASC coverage to employees or their dependents who do not enroll or sign up in the plan. The employer's only obligation runs to those on its plan. Meanwhile, the TPA has duties only to those on the plan it administers. This obligation is entirely derivative of the plan and employment relationships. Thus, in order for the accommodation to accomplish its basic purpose, the employer must amend its own plan and thereby command its own TPA to provide its own employees with CASC services under its own plan. Under the accommodation, it is the employer's plan, and not a government plan, that provides CASC coverage.

Congress, through the ACA, and the executive branch through HHS, DOL, and IRS (collectively, "Departments") through regulations, impose the CASC Mandate on employers with respect to their group health plans. Nothing in the statutes or regulations grants individuals the right to obtain ACA-mandated CASC services other than through their employers' plans, and none of these laws gives

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CASC services. See 26 C.F.R. § 54.9815-2713A (effective September 14, 2015) (TPA has an option whether "to remain in a contractual relationship with an eligible organization" after receiving the accommodation notice). This means that if a TPA abandons its contract, the employer must, to avoid huge fines, recruit a replacement TPA that is willing to arrange CASC services. The new TPA does this under the employer's plan that is co-opted under the accommodation. The requirement that the employer recruit a TPA with different religious values than the employer is itself another burden on the employer's religious exercise.

the government authority to provide CASC services other than through an employer's group health plan.

C. Only the employer can adopt or modify its group health plan and determine the plan administrator.

Under ERISA, only an employer can control a plan's basic terms. It is the exclusive role of the employer, as plan sponsor, to create an employee benefit plan by establishing a written instrument that sets out a plan's "basic terms and conditions." *Cigna Corp.* v. *Amara* 131 S. Ct. 1866, 1877 (2011) (citing 29 U.S.C. §§ 402, 1102); see also *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013) ("[ERISA] is built around reliance on the face of written plan documents."). Under ERISA, the employer must explain in this document how it will amend its plan. *Cigna Corp.*, 131 S. Ct. at 1877. These amendment procedures "must be followed for the valid adoption of an amendment." *Overby* v. *Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (citing *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 85 (1995)). Statements in documents not issued by the plan sponsor "do not themselves constitute the terms of the plan." *Cigna Corp.*, 131 S. Ct. at 1878 (emphasis omitted).

ERISA is equally clear that only the employer has authority to designate a plan administrator. See ERISA § 3(16), codified at 29 U.S.C. § 1002(16). The plan administrator is the person "so designated" in the plan instrument described above. *Id.* § (16)(A)(i).[12] Congress has specified that the

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[12] If the plan instrument is silent on this matter, the plan sponsor (employer) holds this responsibility by default. *Id.* § (16)(A)(ii).

Secretary of Labor may overrule this designation only if the plan sponsor "cannot be identified." *Id.* § (16)(A)(iii).[13]

The regulations establishing the accommodation acknowledge these limitations on the Departments' powers. Nowhere do the Departments claim the statutory authority to compel CASC coverage outside an employer's own plan. To the contrary, both the July 2013 regulation that establishes the original accommodation and the July 2015 regulation that finalizes the augmented accommodation confirm that the accommodation works by commandeering the employer's own plan and obligating that plan to provide CASC services.[14]

In its original form, the accommodation requires the employer to execute a government-supplied form and deliver it to its TPA.[15] By doing so, the legal duty to provide CASC services, the government now argues, shifts away from the employer to its TPA, but that duty remains squarely on the employer's own plan.

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[13] Such a plan is called an "orphan plan." See DOL, *Report of the Working Group on Orphan Plans* (Nov. 8, 2002), http://www.dol.gov/ebsa/publications/AC_110802_report.html.

[14] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) ("participants . . . in a self-insured plan of an eligible organization" receive CASC services); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,328 (July 14, 2015) ("[P]lan beneficiaries and enrollees should not be required to . . . enroll in new programs or to surmount other hurdles to receive access to coverage.")

[15] 26 C.F.R. § 54.9815–2713 (IRS); 29 C.F.R. § 2590.715–2713A (DOL); 45 C.F.R. § 147.131 (HHS).

The Departments' regulations acknowledge that, even after the accommodation, the plan remains the employers' plan. Through the accommodation, the TPA "becomes an ERISA section 3(16) plan administrator . . . in a self-insured plan *of an eligible organization*." 78 Fed. Reg. at 39,879 (emphasis added). The TPA becomes an administrator under ERISA section 3(16)(A)(i), *id.*, which means it is designated as such "by the terms of the instrument under which the plan is operated," ERISA § 3(16)(A)(i). The Departments' final regulation candidly acknowledges that the TPA is using the platform of the accommodated employer to provide the CASC services. It states that the employer's TPAs are "already paying for other medical and pharmacy services," that any other provider would "lack the coverage administration infrastructure to verify the identity of women in accommodated health plans," and that plan participants "should not be required to enroll in new programs . . . to receive access to coverage."[16]

Because the regulators understood these legal principles, they crafted their EBSA Form 700 to function as a plan amendment masquerading as an opt out. DOL's regulation declares that the self-certification form "is one of the instruments under which *the plan* is operated under ERISA section 3(16)(A)(i)." 29 C.F.R. § 2510.3-16 (emphasis added). And the very last line on the back of that form surrenders the pretense of being an "opt out." It informs the employer and TPA: "This form is an instrument under which *the plan* is operated." EBSA Form 700 (rev. July 2013) (emphasis added).

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[16] 80 Fed. Reg. at 41,328.

There is no doubt that the plan amended is the employer's own plan. Contrary to Judge Posner's theory, *supra* at 6-7, 9-11, the Departments admit the accommodation does not create "two separate health insurance policies." 78 Fed. Reg. at 39,876. Thus, in order for the accommodation to accomplish its basic purpose, the employer must amend its own plan and thereby command its own TPA to provide its own employees with CASC services under its own plan. Any other approach is simply not authorized by federal law.

The augmented accommodation is no different. It operates under the same law and is, therefore, subject to the same constraints. Like the original accommodation, the augmented accommodation makes the TPA a plan administrator under ERISA section 3(16)(A). 80 Fed. Reg. at 41,323. The Departments equivocate on whether it is the employer's notice to HHS or DOL's notice to the TPA that serves as the plan instrument that ERISA section 3(16)(A)(i) requires.[17] But even as DOL claims its "broad rulemaking authority" includes the ability to interpret ERISA section 3(16) contrary to its express terms, it never asserts power to compel a TPA to act outside the employer's plan. In the end, it still acknowledges that "DOL notification" is "an instrument under which *the plan* is operated." 80 Fed. Reg. at 41,323 (emphasis added).

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[17] Compare EBSA Form 700 (rev. Aug. 2014) ("*[A] notice to the Secretary* is an instrument under which the plan is operated." (emphasis added)), with 80 Fed. Reg. at 41,323 ("*The DOL notification* will be an instrument under which the plan is operated. . . ." (emphasis added)).

The Departments' accommodation requires that CASC services be delivered through objecting employers' group health plans because the Departments have no other option under the law. Only group health plans can be obligated to provide CASC services, and only employers can establish, maintain, and amend these plans. Bowing to these statutory constraints, the Departments' regulations concede that the accommodation uses the employer's own plan for the delivery of CASC services. The accommodation thus hijacks the objecting employer's own group health plan to provide CASC services contrary to the employer's moral convictions, imposing a substantial burden on the employer's religious exercise.

III. The First Amendment precludes the courts from second-guessing the ministries' moral judgment.

It is remarkable that seven United States Courts of Appeals have held that, because of the availability of the so-called accommodation, the CASC mandate does not substantially burden the religious exercise of ministry employers—even while an historic number of these employers have concluded that complying with the accommodation is forbidden by their religion. These ministries have found the Mandate so morally intolerable that they filed almost sixty lawsuits praying for the courts to protect their religious liberty.

The moral assessments of these religious employers are not casual. Indeed, each has, as a matter of conscience, risked imposition of ruinous fines if judicial relief is denied. In making their own moral assessment, *amici* formally convened their

Ethics Committee. The four Catholic archbishops comprising this committee together have almost thirty years of advanced theological education and over seventy years of episcopal leadership experience. After being advised by legal counsel and consulting with moral theologians, the committee members unanimously approved the resolution determining that Catholic employers "cannot, consistent with Catholic values, comply with the government's CASC mandate, with the accommodation provided to 'eligible employers,' or with the 'augmented accommodation.'" See *supra* at 2-3.

Most of the Circuits, like the Tenth, see *Little Sisters of the Poor*, 2015 WL 4232096 at *18, acknowledge that *Hobby Lobby* and *Thomas* v. *Review Board* preclude them from assessing the plausibility of petitioners' religious claims. *See Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say their religious beliefs are mistaken or insubstantial. Instead, 'our narrow function . . . is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas* v. *Review Board*, 450 U.S. at 716)). They insist that, while they would not do this, it remains their role to assess how the CASC Mandate and accommodation rules work. "[T]he courts[,] not plaintiffs," they say, "must determine if a law or policy substantially burdens religious exercise." See *Little Sisters of the Poor*, 2015 WL 4232096 at *18.

But the Circuits drew legal conclusions about the workings of the accommodation without consideration of most of the law cited in this brief. They concluded, contrary to that law, that the

accommodation was a mere "opt out" that divorced the delivery of CASC services from the ministries' group health plans. It simply is not so. Ministries have made their moral judgment that they cannot participate in this system. Under the guise of pronouncing "how the law works," the Courts of Appeals are really saying, "We have looked at this, and it really does not violate the ministries' religion because it works differently." But *Hobby Lobby* says that is not the role of the courts. The Little Sisters of the Poor and the other ministries have come to the moral conclusion that they cannot sign the forms or participate in this system. The courts cannot tell them they are wrong about whether that action is forbidden, even under the guise of claiming to tell them how the law works.

CONCLUSION

For these reasons, the Catholic Benefits Association and the Catholic Insurance Company pray that this Court grant certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDICES

EBSA FORM 700—CERTIFICATION

(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (each within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer(s) (for insured health plans) or a third party administrator(s) (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a plan's third party administrator that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that:

(1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This form is an instrument under which the plan is operated.

PRA Disclosure Statement

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EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR

2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of

this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulationsand-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

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No. 15-105

IN THE

SUPREME COURT OF THE UNITED STATES

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Court should grant certiorari and supplement the questions that the petitioners presented with an additional question:

Whether the Departments of HHS, Labor, and Treasury have the interpretive authority to craft a religious "accommodation" pursuant to the ACA's "preventive care" mandate.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, files briefs in the courts, and produces the *Cato Supreme Court Review*. Cato has been indefatigable in its opposition to laws and executive actions that go beyond constitutional authority, regardless of the underlying policy merits.

Amicus submits this brief to alert the Court to a potentially alternate ground for resolving this case: If the Departments of Health and Human Services, Treasury, and Labor lack the interpretive authority and "expertise" to promulgate the religious accommodations at issue here, then the petitioners must simply be exempted from the "preventive care" mandate pursuant to the Court's decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). The Court should thus supplement the questions that the petitioners presented to resolve whether the administrative accommodation is consistent with the Departments' interpretive authority under the ACA.

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[1] Rule 37 statements: All parties were timely notified and filed blanket consents to the filing of *amicus* briefs. No counsel for any party authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to fund its preparation or submission.

SUMMARY OF ARGUMENT

This case can be resolved without further engaging in the delicate analysis required by the Religious Freedom Restoration Act. In *Burwell v. Hobby Lobby Stores*, the Court held that regulations implementing the Affordable Care Act's "preventive care" mandate violated RFRA for certain closely held corporations. 134 S.Ct. at 2785. The petition here focuses on the legality of a religious "accommodation" to the same "preventive care" mandate for certain religious non-profits. It was promulgated by the Departments of Health and Human Services ("HHS"), Labor, and Treasury ("Departments"). Before addressing RFRA, however, the threshold question is whether the Departments had the requisite interpretive authority and "expertise" to resolve this "major question" of profound social, "economic and political significance." *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) (citing *Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427 (2014) ("UARG") (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000))). If they do not, *Hobby Lobby* provides the rule of decision and petitioners must be exempted from the mandate. The Court should supplement the questions presented by the petitioners to resolve this foundational issue.

The Affordable Care Act requires that all qualified employers must provide "with respect to women . . . preventive care . . . as provided for . . . by the Health Resources and Service Administration." 42 U.S.C. § 300gg-13(a)(4) (the "preventive care" mandate). HRSA determined, and HHS agreed, that "preventive care" should be interpreted to include all FDA-approved contraceptives. Reacting to public

outrage, HHS recognized that the mandate—for which Congress did not carve out any conscience exceptions as it did for other ACA provisions, such as the individual mandate—would compel certain employers to pay for medical treatments that conflicted with the exercise of their religious beliefs.

In response, the Departments took two decisions to balance religious liberty with their delegated authority to mandate coverage of "preventive care." First, they automatically exempted certain "religious employer[s]"—limited to houses of worship and their auxiliaries—from the mandate; their employees would not receive contraception coverage. 76 Fed.Reg. 46623. Second—and at issue in this petition—they created an "accommodation" to the mandate for other religious employers. By objecting to the mandate, and providing information about their insurers, the organizations are not required to pay the cost of the objected-to contraceptives, but their employees still receive coverage. The Departments do not claim that either the exemption or the accommodation was compelled by RFRA or the First Amendment. Instead, they claim that 42 U.S.C. § 300gg-13(a)(4), among other related provisions, provides the statutory authority to decide which religious organizations should be exempted, and which should be burdened by the accommodation.

But this religious accommodation is not consistent with the Affordable Care Act's "preventive care" mandate. When Congress is silent on how religion should be accommodated, executive-branch agencies do not get *carte blanche* to pick among religious groups that should be exempted from a mandate that imposes a substantial burden on free exercise, nor can they fashion ad hoc

accommodations. Congress could certainly legislate an accommodation in this area, but this same action becomes *ultra vires* if taken by an agency lacking interpretive authority to make such profound decisions. "It is especially unlikely that Congress would have delegated this decision to" the Departments, "which ha[ve] no expertise in crafting" religious accommodations "of this sort" without clear statutory guidance. *King*, 135 S.Ct. at 2489 (citing *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006)).

Further, the Departments' justifications for their accommodation strategy reflects their blinkered approach to protecting religious free exercise. The Departments offered the exemption to houses of worship but not associated organizations based solely on the conclusory assertion that employees of the latter are "less likely" than the former "to share their employer's . . . faith." 78 Fed.Reg. 39887. That HHS refused to exempt people who work for the Little Sisters of the Poor—a group of nuns who vow obedience to the Pope!—is a testament to how out-of-their-league the Departments were in evaluating and responding to burdens on religion. The fact that the rulemaking is premised not on health, labor, or financial criteria, but on the Departments' own subjective determination of which employees more closely adhere to the religious views of their employers, "confirms that the authority claimed by" the Departments "is beyond [their] expertise and [is] incongruous with the [ACA's] statutory purposes and design." *Gonzales*, 546 U.S. at 267.

Moreover, the Departments' decision regarding whether and how to offer religious accommodations is the quintessential "major question" of profound social, "economic and political significance." *Brown &*

Williamson, 529 U.S. at 1315. *Cf. Gonzales*, 546 U.S. at 266-67 (2006) ("The structure of the [Controlled Substances Act], then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise."). Here the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberty interests—a power that the ACA "is not designed to grant." *UARG*, 134 S.Ct. at 2444. The Departments' discovery of this "unheralded power" to decide which religious groups should and should not be exempted from a mandate that otherwise violates RFRA must be "greet[ed] . . . with a measure of skepticism." *Id.*

Finally, neither the express delegation to interpret "preventive care," nor the broad goals of improving "public health" and "gender equality," *Hobby Lobby*, 134 S.Ct. at 2779, can be used to justify a great substantive and independent power to rewrite congressional mandates in light of religious objections. Even if a statute is ambiguous, ad hoc administrative accommodations—as opposed to exemptions compelled by RFRA—cannot possibly be a "permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" broad purposes of the ACA "is not sustainable." *Gonzales*, 546 U.S. at 266-67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). If the FDA's attempt to regulate tobacco in *Brown & Williamson* was "extraordinary," 529 U.S. at 159, then the Departments' decision to craft religious accommodations touching on profound questions of conscience is *far beyond* "extraordinary."

ARGUMENT

I. The Court Should Consider Whether the ACA Affords the Departments of HHS, Labor, and Treasury the Interpretive Authority to Craft the Religious Accommodation

Before resolving the question of whether the accommodation at issue here violates RFRA, the Court must first address whether it is consistent with the interpretive authority delegated to one or more of the Departments by the ACA's "preventive care" mandate. (If it is not, *Hobby Lobby* controls and petitioners must be exempted from the mandate.)

The source of this purported authority is an instruction to interpret what types of "preventive care" must be provided by employers. But this delegation cannot justify an authority to craft exemptions that end up relieving the burden on religious liberty for some organizations and not others. Nor can it justify administrative judgment calls regarding what sorts of accommodations impose "minimal" burdens on the free exercise of religion, 78 Fed.Reg. 39887, or avoid implicating an organization in the commission of sin. These are not matters that are tacitly and cryptically delegated to federal agencies. The Departments' aggrandizement of their own power in this manner, absent any statutory authorization, conflicts with Congress's longstanding control over issues of religious conscience.

A. The Departments Interpreted "Preventive Care" as a Source of Authority for Religious Exemptions and Accommodations

The ACA provides that "with respect to women," an employer's group-health-insurance coverage must furnish "preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration (HRSA)" without cost sharing. 42 U.S.C. § 300gg–13(a)(4). Congress, however, did not define what constitutes "preventive care." Instead, "HRSA developed recommendations in consultation with the Institute of Medicine (IOM)." *Hobby Lobby*, 134 S.Ct. at 2788 (Ginsburg, J., dissenting) (citing 77 Fed.Reg. 8725–8726). IOM "convened a group of independent experts, including 'specialists in disease prevention [and] women's health.'" *Id.* The experts—none of whom had any qualifications in the area of religion or theology[2]—"determined that preventive coverage should include the 'full range' of FDA-approved contraceptive methods." *Id.*

HRSA promptly adopted IOM's recommendations. *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines. These guidelines provide that nonexempt employers are required to provide coverage for "[a]ll Food and Drug Administration approved contraceptives, sterilization procedures, and patient education and counseling for

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[2] Indeed, "religion," "faith," "conscience," and other similar words do not appear anywhere in the 250-page report. Institute of Medicine, *Clinical Preventive Services for Women* (July 19, 2011), https://iom.nationalacademies.org/Reports/ 2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

all women with reproductive capacity." *Id.* The HRSA guidelines applied equally to *all* qualified employers, without any regard for how the mandate would affect the free exercise of religion.

Over the next two years, the Departments developed two approaches for balancing religious-liberty interests with their congressional charge to expand access to "preventive care." First, they automatically exempted "religious employer[s]" from the mandate; their employees would not receive contraception coverage. 76 Fed.Reg. 46623. Initially, the Departments adopted a particularly narrow scope for this exemption, limiting it to an employer that "(1) [h]as the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization." *Id.* The Departments noted that this exemption was "based on existing definitions used by most States that exempt certain religious employers from having to comply with State law requirements to cover contraceptive services." *Id.* Ultimately, to "simplif[y] and "clarif[y]" the regulations, the first three limitations were eliminated, so the exemption was effectively extended to cover to all churches and their integrated auxiliaries. 78 Fed.Reg. 39874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i) or (iii)). Organizations that met these criteria did not need to take any affirmative steps to receive the exemption.

The Departments created this exemption because they claimed it "respects the unique relationship between a house of worship and its employees in ministerial positions." 76 Fed.Reg. 46623. During oral argument in *Hobby Lobby*, in response to a question about whether "Congress can give an

agency the power to grant or not grant a religious exemption based on what the agency determined," the Solicitor General explained that the exemption was offered to take into account "the special solicitude that churches receive under our Constitution under the First Amendment." Tr. of Oral Arg. at 56-58, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) (No. 05-493). Notably, the Departments have never stated that the exemption is *compelled* by either RFRA or the First Amendment.

Second—and at issue in this petition—the Departments created an "accommodation" to the mandate for certain religious employers. The accommodation, unlike the exemption, does not purport to excuse employers from the mandate.[3] Nor does it operate automatically. Instead, it requires the employer to explain to HHS why it objects to providing contraceptive coverage—or certain types of coverage, as was the case in *Hobby Lobby*—and to provide its insurer's contact information. *Little Sisters of the Poor*, 2015 WL 4232096, at *8 (10th Cir. July 14, 2015). If the employer provides the requisite information, the Departments' regulations "shift responsibility to non-objecting entities" to "ensure[] that plan participants and beneficiaries will receive contraceptive coverage." *Id.* at *24.

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[3] Tr. of Oral Arg. at 57, *Hobby Lobby*, 134 S.Ct. 2751 (2014) ("The nonprofit religious organizations don't get an exemption. There's an accommodation there provided, but that accommodation results in the employees receiving access to this -- to the contraceptive coverage . . . .").

B. But Crafting Religious Accommodations Is Not a "Permissible Construction" of the Departments' Interpretive Authority

Before reaching the question of whether the accommodation violates RFRA, the threshold inquiry is whether the Departments' interpretive authority can justify the religious accommodation in the first instance. The ACA, without question, authorizes HHS to make health-care related decisions, Treasury to make financial-related decision, and Labor to make employment-related decisions. 78 Fed.Reg. 39892. Together, these Departments have the authority to interpret and implement the "preventive care" mandate. But the ACA conveys not even a hint that any of these agencies can make the delicate judgments that affect which religious groups should receive an exemption to avoid a violation of RFRA.

The government finds supports for its accommodation in a series of 80 statutes delegating authority to Treasury,[4] Labor,[5] and HHS.[6] 78

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[4] 26 U.S.C. § 7805; 26 U.S.C. § 9833.

[5] 29 U.S.C. §§ 1002(16), 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a, 1185b, 1185d, 1191, 1191a, 1191b, and 1191c.

[6] 42 U.S.C. §§ 18021–18024, 18031–18032, 18041–18042, 18044, 18054, 18061, 18063, 18071, 18082, 26 U.S.C. § 36B, and 31 U.S.C. § 9701. The last series of cited provisions in the ACA—42 U.S.C. §§ 300gg through 300gg–63, 300gg–91, and 300gg–92—are also cited as statutory authority for the exemption. *See* 76 Fed.Reg. 46626. With the exception of 300gg-13, none of these ACA provisions have anything to do with the contraceptive mandate, and for many of them, the Departments lack the requisite interpretive authority anyway. For example, in *King*, the Court ruled that Treasury lacked the "expertise" to

Fed.Reg. 39892. But in their combined nearly 90,000 words, these four-score provisions make absolutely no reference to religion. There are a handful of references to a "church plan," which are defined under ERISA. The only conceivably relevant provision guarantees that "[n]othing in this Act shall be construed to have any effect on Federal laws regarding conscience protection." 42 U.S.C. § 18023 (c)(2)(A)(i). If anything, this suggests a narrowing—not a broadening—of the Departments' power to burden conscience. There is no indication that Congress intended the Departments to make decisions in this realm. If the accommodation is *ultra vires*, *Hobby Lobby* provides the rule of decision and petitioners must be exempted from the mandate.

This is not to say that executive-branch agencies are unequipped to minimize burdens on religious free exercise. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Goldman v. Weinberger*, 475 U.S. 503 (1986). Federal agencies are always obligated to act in accordance with the Constitution and RFRA. When Congress is silent on how religion should be accommodated, however, administrative agencies do not get *carte blanche* to pick among religious groups that should be exempted from a mandate that imposes a substantial burden on religious exercise.[7] Congress could certainly legislate an accommodation in this

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broadly interpret one of these provisions, 26 U.S.C. § 36B. 135 S.Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–267 (2006)).

[7] As the Court held in *Hobby Lobby*, the application of the contraceptive mandate imposes a substantial burden on the free exercise of closely-held for-profit corporations. 134 S.Ct. at 2785. The same result would certainly hold for an order of nuns.

area, but this same action becomes *ultra vires* if taken by an agency lacking statutory authority to make such profound decisions.[8]

On this front, the Tenth Circuit made a fundamental mistake by conflating Congress and the executive branch. The court explained that "the Government enjoys some discretion in fashioning religious accommodations." *Little Sisters*, 2015 WL 4232096, at *36. But who is "the Government"? RFRA certainly extends to an "agency," 42 U.S.C. § 2000bb-2(1), but the statute by itself doesn't cryptically bestow on that agency the expertise and competency to resolve the tensions between religious liberty and public-health policy. The cases cited by the lower court involved decisions by Congress, not executive agencies "fashioning religious accommodations." *Little Sisters*, 2015 WL 4232096, at *36.[9] For example, the panel found

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[8] In their class complaint, petitioners charged that the accommodation was "arbitrary and capricious" under 5 U.S.C. § 706(2)(a), and "lacks legal authority." Little Sisters Complaint (Sep. 24, 2013), at 57-59, available at http://www.becketfund.org/wp-content/uploads/2013/09/Little-Sisters-of-the-Poor-and-Christian-Brothers-v.-Sebelius.pdf. The district court mentioned the issue, but did not rule on this basis. *Little Sisters of the Poor v. Sebelius*, 6 F.Supp.3d 1225, 1233 (D. Co. 2013). The court of appeals didn't address these claims. *Little Sisters of the Poor v. Burwell*, 2015 WL 4232096 (10th Cir. July 14, 2015).

[9] In *Cutter v. Wilkinson*, the Court stated, "This Court has long recognized that *the government* may . . . accommodate religious practices . . . without violating the Establishment Clause." 544 U.S. 709, 713 (2005) (citations omitted). There too, "the government" referred to Congress, in the context of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. 106–274, 42 U.S.C. § 2000cc *et seq.*

unobjectionable the fact that "religious employers" are given an *exemption* to the contraceptive mandate, while other religious non-profits only receive the *accommodation*: "The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a 'longstanding and familiar' distinction in federal law." *Id.* at *35 (citing *Priests for Life v. HHS*, 772 F.3d 229, 238 (D.C. Cir. 2014) and *Geneva Coll. v. HHS*, 778 F.3d 422, 443 (3d Cir. 2015)).

This argument falters because it was Congress that decided that churches "are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000." *Little Sisters*, 2015 WL 4232096, at *35, (citing 26 U.S.C. §§ 508(a), (c)(1)(A)). This was not a decision the Treasury Department reached based on its own independent judgment about the nature of religious organizations and whether they must seek tax-exempt status. Instead, it was the elected members of Congress who deliberated and determined that "churches, their integrated auxiliaries, and conventions or associations of churches" would receive an automatic "mandatory exception." *Id.* The Tenth Circuit's tax-code analogy collapses further because even religious non-profits with receipts over $5,000 will receive the *same exact* tax exemption as churches after they fill out the requisite paperwork. *Congress* determined that the additional burden on the non-profits to seek the exemption and file tax returns was a minimal intrusion, because ultimately the groups wind up with the same tax-exempt status. In contrast, the

petitioners here are still burdened by an altered version of the contraceptive mandate, even after providing HHS the requisite information.[10]

C. The Accommodation Fails to Respect the Departments' Narrowly Circumscribed Role in Avoiding Free-Exercise Burdens

There is an air of déjà vu to this case. In 1977, three years after the enactment of ERISA, the IRS general counsel concluded that an unnamed religious order of nuns, referred to only as the "Sisters," were ineligible to have a "church plan." *See* I.R.S. Gen. Couns. Memo 37266, 1977 WL 46200.[11] At the time, 26 U.S.C. § 414(e) provided that only a retirement "plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501" would qualify for a "church plan." *Id.* at *2. The IRS general counsel recognized that "neither the Code nor the Regulations defines the term 'church,'" so the agency had discretion to provide a reasonable interpretation. *Id.* at *3. Based on its study of the Internal Revenue "Code, Committee Reports, and Regulations," the general counsel found that "'carrying out the functions of a church' means carrying out the religious functions of the church,"

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[10] The Departments concede that "even if the accommodations were found to impose some minimal burden on eligible organizations, any such burden would not be substantial for the purposes of RFRA." 78 Fed.Reg. 39887.

[11] The IRS redacted the name of the order of nuns, but the description is quite similar to duties performed by the Little Sisters of the Poor. IRS Gen. Couns. Memo 37266, 1977 WL 46200, at *1-2.

and that "operating hospitals . . . is not a religious function." *Id.* at *5.

Congress profoundly disagreed. Three years later, "[w]ith the support of a broad-based coalition of religious organizations, Congress retroactively amended and expanded the church plan exemption." *Overall v. Ascension*, 23 F. Supp. 3d 816, 826 (E.D. Mich. 2014) (citing 94 Stat. 1208 (1980)). This new statute rejected the IRS's "narrow[]" interpretation that "include[d] only church organizations if they were focused on worshipful or priestly activities." *Id.* at 825-26. Congress instead specified that an organization "is associated with a church . . . if it shares common religious bonds and convictions with that church." 26 U.S.C. § 414(e)(3)(D). This would include organizations like the petitioners.

In 1983, the IRS general counsel published a memorandum departing from its 1977 opinion. Once again, another unnamed order of charitable nuns requested to have its retirement plan, which covered "lay employees of [the] religious order," qualified as a "church plan" and exempt from ERISA. IRS Gen. Couns. Memo 39007, 1983 WL 197946, at *1 (July 1, 1983). Under the revised statute, the IRS found that "the sisters are 'associated with' the Catholic Church by reason of sharing 'common religious bonds and convictions,'" so an employee "is considered as an employee of the Roman Catholic Church of the United States for purposes of the church plan rules." *Id.* at *4. As a result, the employees of the order were "eligible for coverage by a church plan." *Id.* at *6.

This history teaches two important lessons about the relationship between Congress, executive agencies, and the accommodation of religious liberty.

First, the Treasury Department in 1977 denied the nuns' initial request to have a "church plan," relying on its statutory discretion to interpret the word "church" narrowly. Through this language, Congress delegated the authority to decide what is and is not a church. But this delegation was set against the background principles that this issue was of great social, political, and economic significance. This was not a quotidian regulatory decision, but one that had the effect of burdening religious organizations.

Second, even with such a delegation, Congress has always retained the authority to avoid an "unjustified invasion" of "churches and their religious activities." S. Rep. No. 93-383, at 81 (1973) (Senate Report concerning ERISA). Through the political process, compromises were made that balanced the promotion of retirement benefits with the protection of religious liberty. *See also Gillette v. United States*, 401 U.S. 437, 445 (contrasting Congress's "deep concern for the situation of conscientious objectors to war" with "countervailing considerations, which are also the concern of Congress."). This sort of deliberation did not happen with the rulemaking process that led to the accommodation here.

In a different case, the Court noted that one regulated industry has a "unique place in American history and society," with "its own unique political history" that Congress has long protected. *Brown & Williamson*, 529 U.S. at 169. Yet surely religious freedom is more important to Congress, and to the nation as a whole, than the regulation of tobacco. In this case, "Congress' consistent judgment" must trump the Departments ill-equipped attempt to minimize burdens on free exercise. *Id.*

D. The Departments' Justifications for the Religious Accommodation at Issue Reflects Their Blinkered Approach to Protecting Religious Liberty

The Departments justified the religious-employer exemption to the contraceptive mandate on the grounds that "houses of worship and their integrated auxiliaries . . . are more likely than other employers to employ people who are of the same faith and/or adhere to the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed.Reg. 39887. Other religious associations, like the petitioners, meanwhile, received only the accommodation because their employees "are less likely than individuals in plans of religious employers to share their employer's . . . faith and objection to contraceptive coverage on religious grounds." *Id.* This is the same sort of blinkered distinction the Treasury Department drew in 1977, albeit with a permissible—but congressionally countermanded—interpretation of what a "church" is.

With respect to the contraceptive mandate, the distinction between religious employers was made beyond any permissible scope of the Departments' interpretive authority and in a manner that unjustifiably intruded onto free exercise. Consider the facts of this case. "Each Little Sister has chosen to follow Jesus Christ by taking lifetime vows to offer the poorest elderly of every race and religion a home where they will be welcomed as if they were Jesus himself, cared for as family, and treated with dignity until God calls them to his home." Little Sisters Complaint at 14. To that end, the "Little Sisters have

vowed obedience to the Pope, and thus obey the ethical teachings of the Catholic Church." *Id.* at 15. While the organization has lay employees like any house of worship, the Little Sisters have personally taken an oath that expresses their clear moral opposition to the contraception mandate. In her declaration, Mother Loraine Marie Clare Maguire—the provincial superior of the Little Sisters—explained that the organization "filed a detailed public comment with the government to inform them of our sincere religious objection to incorporating us into their scheme. But the government refused to exempt us." Supp. Decl. (Nov. 15, 2013), at 17.[12]

The Departments here crudely bifurcated houses of worship and their associates, based on a supposition that people who work for the Little Sisters—an obviously religious group of nuns who have vowed obedience to the Pope!—are less likely than church employees to adhere to the teachings of the Roman Catholic Church. This conclusory assertion serves as a testament to how out of their league the Departments were. Moreover, "[i]t is especially unlikely that Congress would have delegated this decision to" HHS, Labor, and Treasury, "which ha[ve] no expertise in crafting" religious accommodations "of this sort" without any statutory guidance. *King*, 135 S.Ct. at 2489 (citing *Gonzales*, 546 U.S. at 266–267).

Here the agencies are "laying claim to an extravagant statutory power" affecting fundamental religious liberties—a power that the ACA "is not

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[12] Available at https://www.scribd.com/doc/275549403/mother-lorraine-pdf.

designed to grant." *UARG*, 134 S.Ct. at 2444. The basis of the distinction between the exemption and accommodation is a delicate, value-laden judgment, one that cannot be made within the permissible bounds of the Departments' interpretive authority. Accordingly, the Departments' discovery of this "unheralded power" to decide which religious groups should and should not be exempted from a regulatory mandate that otherwise violates RFRA, must be "greet[ed] . . . with a measure of skepticism." *UARG*, 134 S.Ct. at 2444. The controversial contraceptive mandate, akin to the contentious "issue of physician-assisted suicide, which has been the subject of an 'earnest and profound debate' across the country, makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267 (citing *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)).

To find that Section 300gg–13(a)(4) in particular affords the Departments the interpretive authority to balance religious liberty and public health, "one must not only adopt an extremely" broad interpretation of what providing "preventative care" entails, "but also ignore the plain implication of Congress's" long-standing commitment to the protection of religious liberty. *Brown & Williamson*, 529 U.S. at 160. *See United States v. Lee*, 455 U.S. 252, 260 (1982) ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system."). Had Congress intended to give the Departments *carte blanche* to decide which religious institutions should be subject to the mandate, there would certainly have been a legislative statement to that effect. The fact that 42 U.S.C. § 300gg-13 and all

of the other cited provisions are entirely silent on the issue should be dispositive proof that the agencies lacked the interpretive authority to craft the regulations in the manner they did.[13]

The fact that the accommodation's rulemaking was premised not on health, financial, or labor-related criteria, but on the Departments' own subjective determination of which employees more closely adhere to their employers' religious views, "confirms that the authority claimed by" HHS, Labor, and Treasury "is beyond [their] expertise and incongruous with the statutory purposes and design." *Gonzales*, 546 U.S. at 267. If "Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*

Now, if the Departments (or the courts) had determined that the "preventive care" mandate would violate RFRA as to a specific group, the correct remedy would have been to exempt them—or to change the list of contraceptives covered. Either approach would eliminate the substantial burden to the free exercise of religion under RFRA. The response would not have been to construct an elaborate framework that only purports to "minimize[] the burden on objecting organizations." *See* Brief for the Respondents in Opposition at 25, *Priests for Life v. HHS*, petition for cert. filed (No 14-1453), 2015 WL 4883185. The latter approach is reserved for Congress, the only branch of government elected to make decisions about *both* religious liberty and public-health policy.

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[13] In contrast, consider 26 U.S.C. § 5000A(d)(2), wherein Congress spelled out in great detail how religious objectors could receive an exemption from the individual mandate.

Congress did not authorize the Departments to pick and choose which religious groups—churches yes, nuns no—can be exempted from the mandate. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation."). In the absence of *any* statutory guidance, such interpretive authority is lacking.

II. The Court Must Decide This Case Because the Departments Lack "Expertise" to Answer This "Major Question" of Social, "Economic and Political Significance"

The Departments' decision regarding whether and how to offer a religious accommodation is the quintessential "major question" of profound social, "economic and political significance." *Brown & Williamson*, 529 U.S. at 1315. Even if the "preventive care" mandate is ambiguous in this regard, the accommodation cannot possibly be a "permissible construction of the statute." *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984). "The idea that Congress gave the [Departments] such broad and unusual authority through an implicit delegation in the" broad purposes of the ACA "is not sustainable." *Gonzales*, 546 U.S. at 266-67. The accommodation "exceeds the bounds of the permissible." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002).

In light of the narrow "breadth of the authority" that Congress has afforded to the Departments over this controversial issue, the Court is not "obliged to

defer . . . to the agency's expansive construction of the statute." *Brown & Williamson*, 529 U.S. at 160. Indeed, the Departments lack the "expertise" to make such a decision. *King*, 135 S.Ct. at 2489 (citing *UARG*, 134 S.Ct. at 2444. *Cf. Gonzales*, 546 U.S. at 266-67 ("The structure of the CSA, then, conveys unwillingness to cede medical judgments to an executive official who lacks medical expertise.").

Again, the only possible textual hook to support the accommodation is the phrase "preventive care." 42 U.S.C. § 300gg-13(a)(4). This language provides no intelligible principle to the Departments that would allow them to consider how to accommodate religious liberty—one of the more controversial and finely tuned compromises leading to the Affordable Care Act's enactment.[14] The text of the ACA should leave this court "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

As then-Judge Breyer explained three decades ago, in such situations, "[a] court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the

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[14] Brief of Democrats for Life of America and Bart Stupak as *Amici Curiae* in Support of *Hobby Lobby* and *Conestoga, et al*, 13-354 & 13-356 (2014), at 1-3 (Pro-Life Caucus "offered means by which [ACA] could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion"); Josh Blackman, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 70, 75 (2013) (discussing how protection of conscience was crucial to ACA's enactment).

statute's daily administration." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986). The "interstitial matter" of which contraceptives constitute "preventive care" does not embrace the far broader "major question" of which religious organizations should and should not be exempted from a regulatory mandate that violates RFRA, or how others should be accommodated. This is "an inquiry familiar to the courts: interpreting a federal statute to determine whether executive action is authorized by, or otherwise consistent with, the enactment." *Gonzales*, 546 U.S. at 249. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review").

Further, neither the express delegation to interpret "preventive care," nor the broad goals of improving "public health" and "gender equality," *Hobby Lobby*, 134 S.Ct. at 2779, can be used to justify a great substantive and independent power over free exercise. Because Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001), the Departments cannot alter the fundamental aspects of religious accommodation based on the broad purposes of the ACA. The narrow source of the statutory authority—which offers absolutely no religious exemptions for providing

"preventive care"—could not hide a mouse, let alone the woolly mammoth that is religious liberty. *Id.* In *Brown & Williamson*, the Court recognized that "[i]n extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U.S. at 159. If the FDA's attempt to regulate tobacco in *Brown & Williamson* was "extraordinary," then the Departments' decision to craft religious accommodations touching on profound questions of conscience is a *fortiori* beyond the pale. Deciding which religious groups should and should not be exempt from the contraceptive mandate, and how others should be accommodated, was "not a case for" HHS, Labor, and Treasury. *King*, 135 S.Ct. at 2489.

CONCLUSION

The Court should grant certiorari and supplement the questions that the petitioners presented with the additional question suggested by *amicus curiae*.

Respectfully submitted,

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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATTHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

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BRIEF OF AMICI CURIAE CHRISTIAN AND MISSIONARY ALLIANCE FOUNDATION, INC., ET AL., IN SUPPORT OF PETITIONERS

This brief is submitted on behalf of Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community; the Alliance Community for Retirement Living, Inc.; the Alliance Home of Carlisle, Pennsylvania d/b/a Chapel Pointe at Carlisle; Town and Country Manor of the Christian and Missionary Alliance; Simpson University; and Crown College as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

Amici are four religious, non-profit retirement communities and two religious, non-profit colleges associated with the Christian and Missionary Alliance ("CMA") denomination. All amici follow the doctrines and teachings of the CMA. This includes the belief that all life is equally sacred and blessed of God and must be preserved and nurtured. Because of their belief in the sacredness of all human life, the amici's sincere religious convictions preclude them from providing for, facilitating, authorizing, or designating, directly or indirectly, the provision of drugs, devices, procedures, or counseling that could harm or kill a fertilized egg. Amici thus have a

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both petitioners and respondents were notified of the amici's intention to file this brief at least 10 days prior to its due date in accordance with Supreme Court Rule 37.2(a). Letters from the petitioners and the respondents consenting to all amici briefs are on file with the Clerk's office.

strong interest in preserving their right under the Religious Freedom Restoration Act of 1993 to choose to offer health insurance coverage that comports with their sincere religious beliefs.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

> *Now, what ... kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined?*
> *— Justice Kennedy during oral argument in Burwell v. Hobby Lobby Stores*[2]

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But it also means much more. It allows individuals to "preserv[e] their own dignity and ... striv[e] for a self-definition shaped by their religious precepts." *Id.* And it protects the individual's "right to express [her] beliefs and to establish [her] religious (or non-religious) self-definition in the political, civic, and economic life of our larger community." *Id.*

A believer's ability to act in accordance with his religious beliefs is inestimably important. In religion, as in all aspects of life, actions often speak louder than words. Recognizing that different people may assign different significance to different acts, the government and the courts have studiously

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[2] Transcript of Oral Argument at 56, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354).

avoided judging the importance or reasonableness of the actions that an individual believes will bear on his eternal fate.

Reiterating and reinforcing this tradition, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"). In RFRA, Congress made a clear policy determination about the importance of religious liberty—including the right to act in accordance with one's faith. Congress declared that, as a default rule, religious beliefs must be respected, even if that means religious believers have to be exempted from otherwise generally applicable laws. It made this default rule applicable across the U.S. Code, including to subsequent enactments like the Affordable Care Act ("ACA"). And Congress afforded protection to all religious believers without drawing presumptive distinctions between them.

Despite this, when implementing the "preventative care" provision of the ACA, HHS decided that only *some* religious believers were entitled to the full protections that RFRA provides. Knowing that several religious entities—both churches and other religious organizations—objected to having any involvement in providing contraceptives, HHS nonetheless determined that it needed to completely exempt only churches from the contraceptive mandate. In HHS's view, non-churches which shared *identical* religious beliefs did not deserve the same protection. Instead, they merited only an accommodation which required them to authorize another entity to use their healthcare plans to provide contraceptive coverage in their stead—an action that the religious objectors consider morally tantamount to providing the objected-to contraceptives themselves.

In drawing arbitrary distinctions between classes of religious believers, HHS contradicted an express statutory protection, exceeded its delegated authority, and substantially burdened the sincere religious beliefs of several objectors, including the petitioners in this case. HHS has given the non-church religious objectors two choices: violate their sincere religious beliefs or pay a hefty fine. This Court already found that this choice violates RFRA, and it should not hesitate to do so again.

REASONS FOR GRANTING THE PETITION

A. This Case Is Exceptionally Important Because HHS's Bifurcated Exemption-Accommodation Scheme Directly Contradicts Congress's Command for Universal Protection of Religious Liberty in RFRA

An important separation-of-powers issue permeates petitioners' and other religious organizations' objections to HHS's decision to require contraceptives as a form of "preventative care" under the ACA. Knowing full well that several religious employers objected to providing some or all of the contraceptives it had required, HHS nonetheless exempted churches—and *only* churches—from its contraceptive mandate. It required all other religious organizations to either be complicit in fulfilling the regulatory mandate or drop their insurance plans and pay substantial fines. By offering some religious objectors greater protection than others, HHS improperly took upon itself the status of super-legislature, deciding just how far the government should go in protecting religious liberty. But neither the Constitution, nor Congress, gave HHS that power over this

important question. In RFRA, Congress in fact *obligated* HHS to afford the *same protection* to the sincere beliefs of all religious objectors regardless of whether they qualify as churches under the Internal Revenue Code.[3] Indeed, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring). Given RFRA's undiscriminating protection of religious liberty and its applicability to all statutes, including subsequent enactments such as the ACA, HHS lacked authority to deny sincere religious objectors the complete exemption from the contraceptive mandate that it deemed necessary to protect churches which share the exact same beliefs.

When it enacted RFRA, Congress made a sweeping statement regarding the importance of religious liberty. It recognized "free exercise of religion as an unalienable right." 42 U.S.C. § 2000bb(a)(1). It affirmed its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(3). And it concluded that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." *Id.* § 2000bb(a)(2).

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[3] HHS delineated the churches exempt from the contraceptive mandate using a tax exemption found in the Internal Revenue Code. *See* 45 C.F.R. § 147.131(a) (citing 26 U.S.C. § 6033(a)(3)(A)(i),(iii) to define exempt churches); *see also* 26 C.F.R. § 1.6033-2(g)(i)–(ii).

Congress's pronouncement was not merely rhetorical. It gave these sweeping statements equally sweeping effect. In RFRA, Congress provided that the government—including any "branch, department, agency, instrumentality, and official" of the United States, *id.* § 2000bb-2(1)—cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," *id.* § 2000bb-1(a). And it made this rule applicable to every federal law and every implementation of federal law whether it pre-dated RFRA's passage or was enacted thereafter. *Id.* § 2000bb-3(a). Congress in essence created a "super-statute"—a statutory command that "cut[s] across all other federal statutes (now and future, unless specifically exempted) and modif[ies] their reach." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom & the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995).

Congress offered only two narrow means for overriding the sweeping protection it afforded to religious exercise in RFRA. Congress can choose to lift RFRA's rigorous protections by "explicitly" exempting a particular enactment from its requirements. 42 U.S.C. § 2000bb-3(b). Or the government can justify imposing a substantial burden on religious exercise in a particular case by demonstrating that its actions constitute the least restrictive means of furthering a compelling governmental interest. *Id.* § 2000bb-1(b). If neither of these exceptions is satisfied, then the government cannot impose a burden on an individual's religious exercise regardless of whether the law is otherwise generally applicable. *Id.* § 2000bb-1.

When it enacted the ACA, Congress did not exclude RFRA's application. That means, at minimum, two things. *First*, when it enacted the ACA, Congress made a determination that the ACA's goals were not so compelling that religious objections should be required to yield to them—for if they were so compelling, Congress would have explicitly exempted the ACA from RFRA's reach. *Second*, every requirement that the ACA imposes—including the requirement to provide "preventative care"—is subject to an express *statutory* exemption available to any person who can show that the requirement places a substantial burden on their sincere religious beliefs. Only if the government shows that the burden imposed on that particular believer is the least restrictive means of furthering a compelling interest can the exemption be overcome. In this respect, the government must isolate a compelling interest *apart from the need to effectuate the burden-imposing law itself*; the latter cannot serve as that interest in light of Congress's decision to subject the ACA to religious exceptions.

These two background rules supplied by RFRA form the statutory bounds that should have guided, and restrained, HHS when it set out to define what forms of "preventative care" individual and group health plans were required to provide. *See* 42 U.S.C. § 300gg-13(a)(4). After all, HHS's authority, even if broad, always remains subservient to clear statutory text. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444–45 (2014). Instead of respecting the statutory commands, however, HHS proceeded to issue regulations that purport to categorically narrow the scope of RFRA's protections in the context of the ACA's "preventative care" requirement by excluding

from those protections any religious entity that does not qualify as a church or an integrated auxiliary of a church under the Internal Revenue Code.

Shortly after HHS issued its initial proposed list of preventative services that individual and group health plans would be required to provide, several religiously affiliated organizations objected to the requirement that their plans supply all FDA-approved contraceptive methods. *See* 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). The religious objectors pointed out that "requiring group health plans sponsored by religious employers to cover contraceptive services that their faith deems contrary to its religious tenets would impinge upon their religious freedom." *Id.* Many religious employers had never covered these benefits, and they objected to being forced to do so in contravention of their religious beliefs. *Id.*

HHS responded by "balanc[ing] the extension of any coverage of contraceptive services ... to as many women as possible" against "the unique relationship between certain religious employers and their employees in certain religious positions." *Id.* In making its own determination about how to appropriately strike this balance, HHS decided to offer a religious exemption to some religious objectors but not others. Churches and their integrated auxiliaries were excepted from the contraceptive mandate; all other religious objectors were not. 78 Fed. Reg. 39870, 39873–75 (July 2, 2013); *see also* 45 C.F.R. § 147.131. According to HHS, those other objectors would be sufficiently "accommodated" if they could permit someone else to use their insurance plans to provide the contraceptives that their religious objections did not allow them to provide themselves. Un-

surprisingly, the religious objectors did not find this "accommodation" satisfactory. *See* 78 Fed. Reg. at 39873–75.

In deciding to respect the concerns of some religious objectors but not others, HHS has attempted to re-strike a balance that Congress already struck when it enacted the ACA. Congress knew full well that by enacting the ACA without an exception from RFRA, it was leaving fully intact RFRA's requirements. Congress thus made a determination that the ACA's goals should not be pursued at the expense of *any person's* religious liberty. HHS could not comply with RFRA by drawing categorical distinctions between groups of religious objectors: "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

In enacting RFRA, Congress did not draw distinctions between religious believers that turned on the vagaries of their status under the Internal Revenue Code, and for good reason. Just as religious beliefs do not become any less sincere or deserving of protection when the believer decides to make a living using a business organized in the corporate form, *see Hobby Lobby*, 134 S. Ct. at 2768–72, religious beliefs do not become any less sincere or deserving of protection when the believers decide to pursue educational and charitable endeavors in accordance with their faith, *cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707–09 (2012). The "enigmatic" result of HHS's bifurcated

exemption-accommodation scheme is that individuals who "share identical[] religious beliefs" can adhere to those beliefs when the Internal Revenue Code has declared them a church, but not "when acting as the heads of the charitable and educational arms of [that same] Church." *See, e.g.*, *Zubik v. Sebelius*, 983 F. Supp. 2d 576, 607 (W.D. Penn. 2013).

HHS's line-drawing thus contravenes the line that Congress—the *law-making* authority—decided was appropriate. Congress could have decided that the protections RFRA affords religious liberty should only apply to churches—but it did not. Congress could have decided that the "preventative care" requirement in the ACA was so important that no, or only some, religious objectors should be exempt from it—but it did not. Congress instead left RFRA fully applicable to the ACA. *See* 42 U.S.C. § 2000bb-3(a). HHS is bound to take action consistent with this legislative determination. It does not have the power to revise or reverse it.

Putting the case in a different context illustrates the point. Suppose Congress enacted a law that required any power plant that emitted pollutants to obtain a permit. And suppose further that Congress created a statutory exemption for power plants that emitted less than 100,000 tons of those pollutants per year. Could the agency decide to "'tailor' [the] legislation to [its] bureaucratic policy goals" by offering the statutory exception only to power plants that emitted less than 500 tons of pollutants per year? *See Util. Air Regulatory Grp.*, 134 S. Ct. at 2444–45. Certainly not. To do so would be to contradict the "unambiguously expressed intent of Congress" and thus to go "well beyond the 'bounds of [the agency's]

statutory authority.'" *See id.* at 2445 (citation omitted).

So too in the context of the ACA. No one would suppose that the agency could decide to limit the statutory exception for grandfathered health plans to exclude grandfathered plans that are less than ten years old. *See* 42 U.S.C. § 18011. And no one would suppose that the agency could decide to revise the statutory exception for small employers to exclude those that employ fewer than forty individuals rather than those who employ fewer than fifty. 26 U.S.C. § 4980H(c)(2)(A). There is no reason to treat the exemption for religious objectors in RFRA any differently. HHS cannot arbitrarily restrict the exemption for *all* religious objectors to tax-code-labeled churches any more than it can restrict the exception for all grandfathered plans to those that are more than ten years old or the exception for small employers to those that have fewer than forty employees.

HHS's actions in implementing the ACA demonstrate that it sees RFRA's command to protect religious exercise as a secondary consideration, subordinate to HHS's regulatory goal of distributing contraceptives. Indeed, as the facts of this case demonstrate, HHS sees RFRA's command as so subordinate to its regulatory goals that it is willing to demand compliance with the "accommodation" even if compliance does nothing more than force religious objectors to violate the tenets of their faith. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, Case Nos. 13-1540, 14-6026, 14-6028, 2015 WL 4232096, at *9–10 (10th Cir. July 14, 2015) (noting that Little Sisters of the Poor must comply with the accommodation even though its employees receive coverage through a self-insured church plan

and "the Departments concede they [presently] lack authority to compel church plan TPAs to provide contraceptive coverage"). Congress could not have been more clear in requiring the opposite. In RFRA, Congress expressly exempted individuals or entities from "rule[s] of general applicability" that "substantially burden" their "exercise of religion," 42 U.S.C. § 2000bb-1(a), and it made this exemption fully applicable to subsequent enactments such as the ACA, *id.* § 2000bb-3(a). Congress firmly decided that statutory requirements, including the ACA, *could and should* tolerate religious exceptions for *any* person whose sincere beliefs were substantially burdened. HHS had no authority to contravene or reevaluate that decision.

B. The Decision Below Is Wrong In Upholding a Purported Accommodation That Imposes a Substantial Burden On Sincere Religious Beliefs in Violation of RFRA

Contrary to RFRA's commands, it is evident from the very nature of HHS's bifurcated exemption-accommodation scheme that the agency intended to distinguish between religious objectors based on its own determinations about the import of the particular believer and the reasonableness of the particular belief.

1. HHS knew that many religious organizations objected to participating directly or indirectly in providing contraceptives. *See, e.g.*, 76 Fed. Reg. at 46623. Yet it automatically exempted only *some* religious objectors from the mandate: HHS effectively classified churches as more "religious" than other religious organizations based on their status under the

Internal Revenue Code. *See* 78 Fed. Reg. at 39873–74.

As HHS explained, it exempted churches because it believed that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874; *see also* 80 Fed. Reg. 41318, 41325 (July 14, 2015). And, when a commenter recently pointed out that some churches and integrated auxiliaries might not employ people of the same faith, HHS further justified its decision to afford churches special treatment by claiming that the exemption was consistent with churches' "special status under longstanding tradition in our society and under federal law." 80 Fed. Reg. at 41325.

HHS has cited no support for the proposition that a church is more likely than other religious organizations to share its religious beliefs with its employees. And, beyond the supposition that churches are inherently more religious than other institutions, there is no reason to suspect this is true. Quite to the contrary, past cases show that numerous other types of religious organizations, including schools and charitable organizations like the Little Sisters of the Poor, are just as likely as churches to hire individuals who share their religious beliefs. *See Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 699–700; *see also Little Sisters of the Poor*, 2015 WL 4232096, at *10. Congress recognized as much when it exempted not only churches, but any "religious corporation, association, educational institution, or society" from the equal em-

ployment provisions of Title VII. *See* 42 U.S.C. § 2000e-1(a).

HHS's newly discovered justification for treating churches differently than other religious institutions fares no better. Contrary to HHS's assertion, with respect to protections for religious exercise, churches have *not* been singled out for a "special status under longstanding tradition in our society." 80 Fed. Reg. at 41325. Instead, this Court has held that all religious believers are entitled to the same protection, regardless of whether they pursue their faith in an established church or elsewhere. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246, 255 & n.23 (1982) (criticizing a statute that effectively drew distinctions between "well-established churches" and "churches which are new and lacking in a constituency" as "set[ting] up precisely the sort of official denominational preference that the Framers of the First Amendment forbade"); *see also Hobby Lobby*, 134 S. Ct. at 2767–68; *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993).

More to the point, HHS's argument that some religious believers should be treated differently than others under the ACA because of a "longstanding tradition in our society" has already been rejected by this Court. *See Hobby Lobby*, 134 S. Ct. at 2773–74. In *Hobby Lobby*, this Court was unpersuaded by HHS's argument that a line should be drawn between "churches and other nonprofit religious institutions," on one hand, and "for-profit corporations,"

on the other hand, based on a national "tradition."[4] *Id.* at 2773. HHS now puts forth essentially the same argument that failed before, only altering *where* it wants to draw the line: According to HHS, "longstanding tradition in our society" now supports a distinction between churches and other religious adherents rather than between non-profit and for-profit entities. 80 Fed. Reg. at 41325. This new-found "longstanding tradition" should be rejected for the same reasons this Court rejected the "tradition" in *Hobby Lobby*: Congress drew no such distinction in RFRA. *Hobby Lobby*, 134 S. Ct. at 2773–74. As has been repeatedly emphasized, "RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation." *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

2. HHS implicitly decided that offering what it deemed the more "religious" objectors a complete exemption from the contraceptive mandate was an appropriate way to avoid imposing a substantial burden on their beliefs. And as a result of the exemp-

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[4] Interestingly, in *Hobby Lobby*, HHS touted the exemption for all religious organizations in Title VII as the best evidence of a national "tradition" of providing exemptions to accommodate religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2773. Yet in adopting the bifurcated exemption-accommodation scheme, HHS chose to ignore the scope of the traditional Title VII exemption that was crafted expressly for the employment context, and to instead apply one codified in the Internal Revenue Code, under the theory that the latter is better tailored to identify employers who are "more likely than other employers to employ people of the same faith who share the same objection." 78 Fed. Reg. at 39874.

tion, those churches need not certify their religious beliefs, provide any notice to HHS or any other entity, or take any action that would result in the provision of contraceptives to their employees through their own healthcare plans. *See id.*; *see also* 45 C.F.R. § 147.131(a).

Although HHS does not dispute that other religious objectors, including the petitioners in this case, share sincere beliefs *identical* to those of the churches that HHS chose to exempt from the mandate, HHS has nonetheless determined that these other objectors are not deserving of identical protections. Instead, HHS offers these objectors a purported "accommodation" that continues to require them to "comply" with their obligation to provide contraceptives. 78 Fed. Reg. at 39879.

To satisfy HHS's accommodation, the religious objectors must either complete a self-certification form or provide notice to HHS of their religious objections to some or all of the contraceptives that the mandate would otherwise require them to provide. 80 Fed. Reg. at 41322–23. Whether religious objectors complete the self-certification form or provide HHS notice, the end result is the same: They become complicit in the mandate, and in most (if not all) cases their insurers, third-party administrators, or other plan contractors will use the objectors' healthcare plan to "provide coverage for contraceptive services without cost sharing to participants and beneficiaries." *Id.* at 41323; 78 Fed. Reg. at 39876.[5]

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[5] Although HHS concedes that it currently may not force the third-party administrators for self-insured church plans to provide contraceptive coverage, *see Little Sisters of the Poor*, 2015 WL 4232096, at *9, it evidently believes that it will be

The religious objector's self-certification or HHS notification has two important consequences. *First*, for those that purchase group insurance and for most self-insured plans, the notice or self-certification shifts financial and some of the administrative responsibility for providing contraceptive coverage to either the objector's insurer or, if it is self-insured, to its third-party administrator. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. *Second*, in all cases, the notice or self-certification gives the insurer, third-party administrator, or other plan contractors the authority to use the "insurance coverage network" and the "coverage administration infrastructure" that the objector has established to provide the objected-to contraceptives. 80 Fed. Reg. at 41328–29; 78 Fed. Reg. at 39879–80. That is, rather than creating "two separate health insurance policies," 78 Fed. Reg. at 39876, the accommodation allows other entities to use the objector's own healthcare plan to provide the contraceptives. *See* 80 Fed. Reg. at 41323; 78 Fed. Reg. at 39876. In effect, then, the accommodation scheme requires religious objectors to hand over their healthcare plans to other entities, knowing that those entities can and likely will use the plan to provide contraceptives in their stead.

This accommodation substantially burdens religious objectors' concededly sincere religious beliefs. Religious objectors like the petitioners adamantly believe that *any* facilitation of or complicity in the

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able to convince or coerce *someone* to provide contraceptives through the religious objector's healthcare plan. Specifically, HHS believes that once a religious objector complies with the accommodation, HHS has the power to authorize *any* of the plan's third-party contractors to provide contraceptive coverage through the plan.

provision of contraceptives will have eternal ramifications. And they adamantly believe that participating in the government's proposed accommodation scheme forces them to facilitate the provision of contraceptives. But, unlike tax-code-labeled churches, the religious objectors here must comply with HHS's contraceptive mandate (directly or indirectly) or pay substantial fines. This categorical preference for churches over other, equally sincere believers is plainly absurd and should not be permitted, especially given Congress's decision not to draw such a distinction in RFRA. *See supra* at 9–10.

By deciding to afford a complete exemption to churches, HHS has already implicitly recognized that the proposed accommodation is not sufficient to avoid substantially burdening sincere religious beliefs. And rightly so. The purported accommodation gives religious objectors two choices: Take an action directly contradictory to their sincerely held religious beliefs or pay a hefty fine. That should be enough to find that the religious objectors' beliefs have been substantially burdened in violation of RFRA. *See Hobby Lobby*, 134 S. Ct. at 2777–79. After all, "the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." *Little Sisters of the Poor*, 2015 WL 4232096, at *42 (Baldock, J., dissenting in part). And the penalties the ACA imposes for noncompliance with the contraceptive mandate have already been found substantial. *Hobby Lobby*, 134 S. Ct. at 2775–77.

HHS, and the Tenth Circuit below, however, went beyond asking whether the religious objectors *did* have a sincere belief that the law demanded they violate and additionally asked whether the religious objectors *should* have held that belief in light of the legal mechanics that underlie HHS's accommodation. This inquiry crossed a line that courts and administrative agencies have no business crossing.

As this Court already held, neither HHS nor the courts have the authority to tell a religious objector that his belief about what types of actions are immoral is "flawed" because "the connection between what the objecting parties must do ... and the end that they find to be morally wrong ... is simply too attenuated." *Hobby Lobby*, 134 S. Ct. at 2777. Instead, "the question that RFRA presents [is] ... whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*." *Hobby Lobby*, 134 S. Ct. at 2278. Courts have "no business addressing" moral and philosophical questions regarding "whether the religious belief asserted in a RFRA case is reasonable." *Id.* Indeed, even prior to RFRA, this Court held that evaluating the reasonableness of a religious belief was simply not a task courts could or should undertake. *See id.* (citing *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 887 (1990); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969)).

Even assuming that HHS or the courts could appropriately evaluate the reasonableness of the religious objectors' beliefs, they would have no reason to

second-guess the moral logic of the objectors in this case.

The accommodation scheme leaves religious objectors three choices. *First*, they can directly provide contraceptives—an act that everyone agrees would substantially burden sincerely held religious beliefs if compelled. *Second*, they can refuse to provide healthcare coverage to avoid providing contraceptives and pay substantial monetary fines instead—also an act that all agree would substantially burden sincere religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2776–77. Or *third*, they can participate in HHS's accommodation scheme—the act that HHS claims is not a substantial burden.

This third act, however, is a substantial burden that does not functionally differ from the first. By participating in the accommodation, the religious objector authorizes the government to commandeer its healthcare plan and provide contraceptives through it. And both moral philosophers and society writ large intuitively recognize that providing material aid to those who would perform the ultimately wrongful act constitutes a morally culpable act in and of itself.

Treatises on moral philosophy expressly recognize the potential culpability of those who knowingly engage in innocent conduct that aids another in a wrongful act. As they put it, "[c]ooperation occurs 'when A helps B to accomplish an external act by an act that is not sinful, and without approving of what B does.'" *See Hobby Lobby*, 134 S. Ct. at 2778 n.34 (quoting 1 H. Davis, Moral and Pastoral Theology 341 (1935)).

Accepting this premise of moral blameworthiness, the law also recognizes that even minimal involvement in a criminal enterprise can constitute a blameworthy act. For instance, a man that allows his car to be used to transport a gun and a group intent on a committing a drug crime has aided and abetted the offense of carrying or using a gun during a drug crime. *See, e.g.*, *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir. 1996); *see also Bazemore v. United States*, 138 F.3d 947, 950 (11th Cir. 1998). And a man that allows his house to be used for a meeting where guns are displayed and discussed and later used in a drug crime has aided and abetted in the same offense. *See, e.g.*, *United States v. Luciano-Mosquera*, 63 F.3d 1142, 1150 (1st Cir. 1995); *cf. United States v. Daniels*, 370 F.3d 689, 691–92 (7th Cir. 2004); *Wright v. United States*, 182 F.3d 458, 465–66 (6th Cir. 1999). Likewise, under the *Pinkerton* rule, a person can be found guilty for simply conspiring to commit a crime, regardless of the degree of his individual involvement or knowledge of the substantive acts charged. *See Salinas v. United States*, 522 U.S. 52, 63–64 (1997) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

The religious objectors are applying the same logic of moral culpability here. They believe that providing another (their insurer, third-party administrator, or any other plan contractor) with a means (their healthcare plans) to achieve an immoral end (providing contraceptives) is itself an immoral act. Far from being an idiosyncratic view of the degree of involvement necessary to give rise to moral blameworthiness, their view is broadly accepted as a matter of moral philosophy and criminal liability.

3. Because it imposes on the sincere religious beliefs of religious objectors, like petitioners, HHS's accommodation can only be justified if it is the least restrictive means of achieving a compelling interest. By their own actions, however, Congress and HHS have demonstrated that they do not view the interests underlying the ACA's contraceptive mandate as so compelling and unyielding that religious objectors must be forced to comply with it in contravention of their religious beliefs. For that reason, Congress did not exclude the ACA from RFRA's reach. And for that reason, HHS has already exempted churches and their auxiliaries from the mandate. *See* 78 Fed. Reg. at 39873–74. There is no reason HHS cannot do the same for other religious objectors who share identical religious beliefs. And there is certainly no reason that HHS cannot do the same for religious objectors that, like the Little Sisters, provide healthcare coverage through self-insured church plans whose administrators currently cannot be compelled to provide contraceptives anyway. *Little Sisters of the Poor*, 2015 WL 4232096, at *9. Indeed, HHS already has the framework in place to offer just such an exemption: It can extend the existing exemption applicable to churches to all nonprofit religious entities that have "consistently not provided all or the same subset of the contraceptive coverage otherwise required, at any point ... because of the religious beliefs of the organization" just as it did during the temporary enforcement safe harbor period.[6] And where it can do the same for similarly sit-

[6] See Dep't of Health and Human Services, Guidance on the Temporary Enforcement Safe Harbor for Certain Employers, Group Health Plans and Group Health Insurance Issuers with Respect to the Requirement to Cover Contraceptive Services

uated religious objectors, RFRA demands that it must. *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring).

* * *

RFRA does not allow a government agency to decide what actions a religious adherent should find morally culpable. And RFRA certainly does not allow a government agency to decide that only some religious adherents should be protected from engaging in activity that they sincerely find morally culpable. Yet in designing the bifurcated exemption-accommodation scheme, HHS did both of these things, exceeding the scope of its constitutional and regulatory authority.

Although HHS knew that both churches and other religious entities shared the same religious objections to facilitating access to some or all contraceptives, the agency chose to exempt only part of that group from the mandate. It offered the rest a choice: They could comply with the mandate by authorizing others to use their healthcare plans to distribute contraceptives in their place—in direct contravention of their beliefs—or they could cease providing healthcare coverage altogether and face substantial monetary penalties.

Under the reasoning this Court employed in *Hobby Lobby*, RFRA makes this choice impermissi-

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Without Cost Sharing Under Section 2713 of the Public Health Service Act, Section 715(a)(1) of the Employee Retirement Income Security Act, and Section 9815(a)(1) of the Internal Revenue Code (reissued bulletin), at 4 (June 28, 2013) *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/preventive-services-guidance-6-28-2013.pdf.

ble. As our constitutional tradition and Congress have long recognized, no person should be forced to pay a hefty fine to "express [her] beliefs and to establish [her] religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). Yet the Tenth Circuit's decision below will have precisely that effect on petitioners and other sincere religious believers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U
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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the Tenth Circuit misconstrue the substantial burden test under the Religious Freedom Restoration Act?

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IN THE

Supreme Court of the United States

No. 15-105

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, *et al.*,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE CHRISTIAN LEGAL SOCIETY, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, THE LUTHERAN CHURCH—MISSOURI SYNOD, AND THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE[1]

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys,

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters of consent from both parties are on file with the Clerk.

law students, and law professors with chapters in nearly every state and on many law school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, acts to protect all citizens' right to be free to exercise their religious beliefs.

The Association of Christian Schools International is a nonprofit, nondenominational, religious association providing support services to 24,000 Christian schools in over 100 countries.

The Lutheran Church—Missouri Synod, a Missouri nonprofit corporation, has approximately 6,150 member congregations that, in turn, have approximately 2,400,000 baptized members.

The Institutional Religious Freedom Alliance works with a multi-faith network of organizations to protect the religious freedom of faith-based service organizations by educating the public, training organizations and their lawyers, creating policy alternatives that better protect religious freedom, and advocating to the federal administration and Congress.

The resolution of the questions presented in this case is of substantial importance to amici, who share a commitment to religious liberty, not just for themselves and their respective constituents, but for Americans of all faith traditions. While amici may differ in their views regarding whether the general use of contraceptives is acceptable or whether certain contraceptives act as abortion-inducing drugs, amici agree that the nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in the use or provision of abortion-inducing contraceptives. Amici write in support of the petition because they believe that the

Health and Human Services contraceptive mandate's so-called "accommodation scheme" does not offer adequate protection of religious liberty.

Beyond the specific contraceptive issue presented in this case, amici are also gravely concerned about the Tenth Circuit's approach to resolving the religious liberty issue presented in this case. Under the guise of evaluating whether the regulations at issue imposed a substantial burden on Petitioners' exercise of their religious faith, the Court of Appeals in fact evaluated the religious reasoning that leads Petitioners to believe that the HHS accommodation scheme renders them complicit in the provision of contraceptives in contravention of their faith. The religious reasoning underlying Petitioners' belief is, however, beyond the competence or purview of the courts to review. Amici are concerned that the Tenth Circuit's interpretation of the Religious Freedom Restoration Act (RFRA) as allowing courts to review religious reasoning and beliefs could have far-reaching and detrimental consequences for religious liberty.

SUMMARY OF ARGUMENT

Religious liberty in our constitutional tradition means that "all persons have the right to believe or strive to believe in a divine creator and a divine law." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring). But religious liberty means much more than that. By their terms, both our Constitution and RFRA protect the right of the individual to "exercise" his or her religious beliefs free from government interference. U.S. Const. amend. I; 42 U.S.C. § 2000bb-1(a). Religious liberty protects the individual's "right to express [her] beliefs and to establish [her] religious (or nonreligious) self-

definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring). The Court should grant certiorari in this case because the decision below contradicts the Court's prior decisions concerning religious liberty and because of the potential impact of the Tenth Circuit's decision—and, as importantly, its analysis—on the religious exercise of tens of millions of Americans.

First, the Tenth Circuit applied a flawed test to evaluate whether the Affordable Care Act (ACA), as implemented by HHS, imposes a substantial burden on Petitioners' religious exercise under this Court's precedents. The Tenth Circuit appeared to afford exceptional deference to the regulations at issue because they are styled an "accommodation." HHS regulations enacted under the ACA require, as a general rule, that group health plans provide coverage for all FDA-approved contraceptive methods and sterilization procedures without cost sharing. HHS regulations purport to provide an "accommodation" allowing certain religious organizations that object to the provision of such contraceptives and procedures to "comply" with the mandate by other means. Petitioners object, on sincerely held religious grounds, to providing health insurance that offers certain of these contraceptives and procedures *and* to taking the actions required to avail themselves of the "accommodation," believing that each option makes them morally complicit in the provision of contraceptives in contravention of their religious beliefs.

The Tenth Circuit, while purportedly evaluating whether the challenged regulations work a substantial burden on Petitioners' religious beliefs, in fact reviewed Petitioners' religious reasoning and the correctness of their religious belief that acting pursuant to

the HHS regulatory "accommodation" scheme would make them morally complicit in the provision of contraceptives. The Tenth Circuit ruled that Petitioners, by taking advantage of the accommodation scheme, would not be morally complicit in the provision of contraceptives (Pet. App. 48a & n.20)—as if courts have any competence to evaluate moral complicity.

In fact, this Court's decisions expressly disclaim any judicial role in making such evaluations, either under the First Amendment or RFRA. "[I]t is not within the judicial function and judicial competence to inquire whether" someone who has religious qualms with a law has "correctly perceived the commands of [his] ... faith." *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981). Rather, this Court's decisions confine judicial review of whether an adherent's religious beliefs prohibit compliance with government regulation to the "'narrow function'" of inquiring whether those beliefs "reflect[] 'an honest conviction.'" *Hobby Lobby*, 134 S. Ct. at 2779. In other words, the adherent alone defines the tenets of his or her religious observance; there is no proper role for court review of the reasoning underlying a sincerely held religious belief. Even religious reasoning or beliefs that reasonable observers would view as suspect are entitled to protection if sincerely held. *Id.* at 2778 ("'Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim[.]'" (quoting *Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 887 (1990)).

Once a court determines that a party sincerely believes, reasonably or not, that taking the action the government requires or failing to take the action that the government forbids is contrary to his or her religious beliefs, the only burden question for the court is

whether a substantial governmental sanction attaches to disobedience of the law. If so, and if all means of avoiding a substantial government penalty conflict with that religious belief, the substantial burden inquiry is at an end.

The Tenth Circuit improperly inquired into the validity of Petitioners' belief under the guise of a substantial burden analysis. While acknowledging Petitioners' undisputedly sincere belief that both of the options afforded by HHS regulations to comply with the ACA mandate would make them morally complicit in the provision of contraceptives contrary to their faith, the Tenth Circuit examined at length whether that belief is correct as a matter of law—and held that it is not. Pet. App. 48a & n.20. In effect, the court inquired into whether Petitioners' *belief* is reasonable, rather than whether *the burden placed on that belief* is substantial. In so doing, the Tenth Circuit moved from the role of legal arbiter to that of moral philosopher, and thus moved from a role of constitutional necessity to one of constitutional incompetence. This was improper. It is not for the Tenth Circuit "to say that the [religious] line" Petitioners drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

The Tenth Circuit's substantial burden analysis also improperly focused on the incidental administrative burden of participating in the accommodation scheme, in violation of Petitioners' beliefs. Rather than evaluate the substantial financial penalties the government placed on Petitioners' *adherence* to their religious belief, the court instead measured the ease with which Petitioners could *violate* that belief by participating in the accommodation scheme. This is not the inquiry RFRA requires. To the contrary, "the question that RFRA presents" is whether the challenged govern-

ment action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs." *Hobby Lobby*, 134 S. Ct. at 2778 (emphasis omitted).

Second, it is critical that this Court clarify that "accommodations" must be evaluated the same way as other laws challenged under RFRA, using the correct substantial burden test. If allowed to stand, the modified substantial burden analysis employed by the Tenth Circuit could incentivize regulators to add "accommodations" that do not actually accommodate the exercise of sincerely held religious beliefs. This country has a longstanding tradition of providing robust religious exemptions. *Infra* part II.B. Accommodations-in-name-only would undermine the important historical interests in protecting religious liberty that have been recognized by Congress and this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S SUBSTANTIAL BURDEN PRECEDENTS

A. The Tenth Circuit Departed From This Court's RFRA Precedents By Unduly Deferring To HHS's Characterization Of The Relevant Provision As An "Accommodation"

Substantial burden on a party's religious exercise is evaluated on the basis of the party's own sincerely held religious belief. *E.g.*, *Hobby Lobby*, 134 S. Ct. at 2778. This Court has repeatedly stated that "it is not for us to say" whether a party's religious beliefs "are mistaken or insubstantial." *Id.* at 2779. When a party determines that certain conduct violates its religious beliefs, a court's "'narrow function ... is to determine' whether the line drawn 'reflects an honest conviction.'" *Id.*

The Little Sisters genuinely believe that utilizing the "accommodation" provided by HHS would make them complicit in sin, give the appearance of involvement in sin, and grievously impair their ability to bear witness to the sanctity of human life. That HHS has seen fit to label this procedure as an "accommodation" changes nothing. Nowhere in this Court's prior decisions does the "'narrow function'" of judicial review of religious convictions widen based on whether a party's conviction relates to a law of general applicability or to a regulation that an agency has labelled an "accommodation." *See Hobby Lobby*, 134 S. Ct. at 2779.

Nevertheless, the Tenth Circuit evaluated the accommodation differently from a direct regulation in two ways. *First*, it evaluated the burden of the accommodation *in relation to* the contraceptive mandate, as opposed to evaluating the accommodation in its own right. The Tenth Circuit cited no authority for its assertion that, "[w]hen, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA." Pet. App. 57a. The majority then concluded that the accommodation "eliminates burdens Plaintiffs otherwise would face" (*id.* 60a), and that the "opt out ... relieves objectors of their coverage responsibility" (*id.* 68a)—all to demonstrate that the religious violation that results from the HHS regulations is supposedly *less severe* under the accommodation than by compliance with the contraceptive mandate itself. But whether complying with the accommodation is *less objectionable* than the contraceptive mandate is not the

correct test of substantial burden. *See Hobby Lobby*, 134 S. Ct. at 2778-2779.

Second, the majority placed great weight on the fact that the accommodation was purportedly designed to "reconcile religious liberty with the rule of law" and "to permit the religious objector both to avoid a religious burden and to comply with the law." Pet. App. 73a, 74a. Instead of evaluating the accommodation like any other law, the Tenth Circuit set the accommodation apart, to be evaluated under a new and different standard: whether it "reconciled with religious objections" the "legislative policy choice ... to afford women contraceptive coverage." *Id.* 75a. Based on this erroneous understanding that an accommodation substitutes for RFRA itself, the majority discounted the possibility of a religious objector disobeying a religiously objectionable accommodation. *Id.* 74a. The Tenth Circuit thus refused to engage in a traditional substantial burden analysis, asserting that Petitioners have no right to "stymie coverage to their employees by breaking the law," but instead stated, if they "wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation." *Id.* But this Court held in *Hobby Lobby* that the government cannot force the Petitioners to obey a religiously objectionable law; Petitioners may indeed "rely" on "violating" the accommodation in challenging it under RFRA. *Id.*

The Tenth Circuit points to scant precedent to support treating accommodations differently and in the case it does cite, *Hobby Lobby*, this Court noted that it was *not* deciding whether the accommodation approach complies with RFRA for purposes of all religious claims. 134 S. Ct. at 2782. Although the court below

suggested that the presence of the accommodation relieves Petitioners' religious concerns (Pet. App. 17a), an accommodation is not by definition inoffensive to religious belief or immune from imposing a substantial burden. *See* 42 U.S.C. § 2000bb-3(a) ("This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise[.]"); *United States* v. *Friday*, 525 F.3d 938, 947-948 (10th Cir. 2008) (suggesting that a permit process that purports to accommodate religion could be religiously objectionable and found to be a substantial burden, but claimant did not make this argument); *Beerheide* v. *Suthers*, 286 F.3d 1179, 1186-1187 (10th Cir. 2002) (rejecting non-kosher, vegetarian meals for Orthodox Jewish inmates as an accommodation of kosher diet). Nor is it material that the accommodation is provided by the government as an alternative to another burdensome procedure (providing contraceptive and abortifacient care) that also violates Petitioners' religion.

To the contrary, following the logic of this Court's precedents leads to the opposite conclusion: it is for the party alone to define the tenets of its religious observance. *Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."). Regardless of whether HHS has provided an alternative "accommodation" procedure—or a dozen alternative procedures, or no alternative at all—all avenues currently provided by HHS to avoid penalty violate Petitioners' sincerely held religious beliefs. This Court's precedents neither require more of a showing by Petitioners nor allow more analysis by the courts concerning the inconsistency of the law with Petitioners' conscience. *Hobby Lobby*, 134 S. Ct. at 2778-2779;

Smith, 494 U.S. at 887; *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989); *Thomas*, 450 U.S. at 715.

B. The Tenth Circuit Misconstrued The Substantial Burden Test

The Tenth Circuit asked two improper questions in weighing the accommodation scheme's burden on Petitioners' religious beliefs. *First*, the Tenth Circuit improperly evaluated the verity—as opposed to the sincerity—of Petitioners' belief that participating in the accommodation scheme would violate their religion. *Second*, the Tenth Circuit only considered the small administrative burden of participating in the accommodation scheme and violating those beliefs—not the massive financial penalties for refusing to participate, in accordance with those beliefs.

1. The Tenth Circuit improperly inquired into the validity of Petitioners' belief under the guise of a substantial burden analysis

The Little Sisters believe that participating in either the contraceptive mandate or the accommodation scheme is morally wrong, as either would make them morally complicit in the provision of contraception and abortifacients, in violation of the teachings of the Catholic Church. That Petitioners' belief is sincere is undisputed. Therefore, according to the Tenth Circuit's own reasoning, the analysis should have moved directly to "'the intensity of the coercion applied by the government to act contrary to those beliefs.'" Pet. App. 55a (quoting *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)); *see also id.* ("'Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.'").

Rather than take Petitioners' undisputedly sincere belief at face value, however, the Tenth Circuit went on to examine whether that belief is correct *as a matter of law*—and held that it is not. Pet. App. 48a & n.20. In so doing, it effectively inquired into whether Petitioners' *belief* is substantiated, rather than whether *the burden placed on that belief* is substantial. This is something RFRA does not empower the court to do—indeed, it is antithetical to the very purpose of the law.

This Court's recent decision in *Hobby Lobby* is instructive on this point. In similar circumstances to this case, this Court rejected HHS's argument "that the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception ...) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated" to sustain a finding of substantial burden on Petitioners' religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2777. That line of reasoning, the Court said, "addresses a very different question" than the one posed by a substantial burden analysis, one "that the federal courts have no business addressing[:] whether the religious belief asserted ... is reasonable." *Id.* at 2778. Petitioners believed that complying with the mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them" to comply. *Id.* The Court compared the plaintiffs' causal line-drawing to that in *Thomas*, where the plaintiff believed he could work making steel used in weapons, but not making weapons themselves, and where "[t]his Court ... held that 'it is not for us to say that the line he drew was an unreasonable one.'" *Id.* at 2778 (quoting *Thomas*, 450 U.S. at 715).

Similarly, Petitioners have drawn a line. On the objectionable side of that line is providing contracep-

tive and abortifacient care to employees. *Also* on the objectionable side of that line are signing a document that Petitioners believe makes them morally complicit in the provision of contraceptive and abortifacient care (its appellation as an "accommodation" notwithstanding), and being required to maintain a health plan that the government will commandeer to provide such care. On the other side of that line is a simple declaration that Petitioners object to providing contraceptive and abortifacient care on religious grounds. Such was the injunctive relief that this Court previously granted to Petitioners. The Tenth Circuit was not "convinc[ed]" that the accommodation lies on one side of the complicity line whereas this Court's injunctive relief lies on the other. Pet. App. 59a n. 25. But the persuasiveness of Petitioners' religious line-drawing to a majority of a panel of judges of the Tenth Circuit, or even of this Court, is irrelevant to RFRA's required analysis.

Petitioners' belief implicates the very same "difficult and important question of ... moral philosophy" as the petitioners' beliefs in *Hobby Lobby* and *Thomas*, "namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another." *Hobby Lobby*, 134 S. Ct. at 2778. Petitioners here believe that submitting the accommodation form "is connected to the destruction of an embryo in a way that is sufficient to make it immoral." *Id.* The correctness of that belief is not reviewable by the courts. But rather than defer to that sincere belief as this Court did in *Thomas* and *Hobby Lobby*, *id.* at 2779 ("it is not for [the courts] to say that [petitioners'] religious beliefs are mistaken or insubstantial"), the Tenth Circuit analyzed whether the moral connection asserted by Petitioners is sufficient as

a matter of law, engaging in exactly the type of religious line-drawing this Court forbids.

The Tenth Circuit examined at length whether the accommodation form *legally causes* contraception coverage and concludes that it does not. Pet. App. 63a ("Plaintiffs' causation argument misconstrues the statutory and regulatory framework"); *id.* 68a ("The opt out does not 'cause' contraceptive coverage[.]"). That inquiry, however, is irrelevant in this context. Rather, the Tenth Circuit's "'narrow function ... in this context' is to determine whether the line drawn [by Petitioners] 'reflects an honest conviction,' and there is no dispute that it does." *Hobby Lobby*, 134 S. Ct. at 2779; *see also University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 566 (7th Cir. 2014) (Flaum, J., dissenting) ("[W]e are judges, not moral philosophers or theologians; this is not a question of legal causation but of religious faith.").

The Tenth Circuit probed Petitioners' belief that, as a religious matter, participating in the accommodation scheme "would make them complicit" in the provision of contraception and found it "unconvincing." Pet. App. 85a. Again, as *Hobby Lobby* made clear, whether the Tenth Circuit is convinced by Petitioners' religious line-drawing is irrelevant. As this Court said in *Thomas*, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit ... protection." 450 U.S. at 714. They need only be sincere, and that is undisputed here.

In so scrutinizing the content of Petitioners' beliefs, the Tenth Circuit effectively "arrogat[ed] the authority ... [to] tell plaintiffs that their beliefs are flawed"—something this Court has "repeatedly refused" to do in *Hobby Lobby*, *Thomas*, and a long line of other cases. *See Hobby Lobby*, 134 S. Ct. at 2778 ("'Repeatedly and

in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim.'" (quoting *Smith*, 494 U.S. at 887)); *Hernandez*, 490 U.S. at 699 ("It is not within the judicial ken to question ... the validity of particular litigants' interpretations of those creeds."); *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) ("This Court cannot determine the truth of the underlying beliefs that led to the religious objections here[.]"); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144 n.9 (1987) ("courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs"); *United States* v. *Lee*, 455 U.S. 252, 257 (1982) ("It is not within the 'judicial function and judicial competence,' however, to determine whether appellee or the Government has the proper interpretation of the Amish faith. 'Courts are not arbiters of scriptural interpretation.'" (alteration omitted)).

Unfortunately, other Circuit Courts that have reviewed the accommodation scheme have committed the same error, despite this Court's clear precedent. *E.g.*, *Priests for Life* v. *HHS*, 2015 U.S. App. LEXIS 8326 (D.C. Cir. May 20, 2015); *Geneva Coll.* v. *HHS Sec'y*, 778 F.3d 422 (3d Cir. 2015); *East Tex. Baptist Univ.* v. *Burwell*, 2015 WL 3852811 (5th Cir. June 22, 2015); *Michigan Catholic Conf.* v. *Burwell*, 2015 WL 4979692 (6th Cir. Aug. 21, 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015). This Court's review is vital to ensure that other courts do not follow suit, interposing themselves between claimants and their religious beliefs.

2. The Tenth Circuit failed to consider the significant financial penalties for refusing to participate in the accommodation scheme

To the extent that the Tenth Circuit considered the burden placed on Petitioners' religious belief—rather than the belief's verity—it focused on the incidental administrative burden of participating in the accommodation scheme *in violation* of that belief. *E.g.*, Pet. App. 88a ("Plaintiffs' only involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves."). Here again, the Tenth Circuit asked the wrong question.

As this Court stated in *Hobby Lobby*, "the question that RFRA presents" is whether the challenged government action "imposes a substantial burden on the ability of the objecting parties to conduct business *in accordance with* their religious beliefs." 134 S. Ct. at 2778 (emphasis added; other emphasis omitted). The key to that inquiry is the extent to which government action "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 718; *see also* Pet. App. 55a (quoting *Hobby Lobby*, 723 F.3d at 1125-1126) ("'a government act imposes a "substantial burden" on religious exercise if it ... places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief'").

The Tenth Circuit's analysis turned this Court's substantial burden jurisprudence on its head. Rather than evaluate how large a burden the government places on Petitioners' *adherence* to their religious belief, it focused on how small a cost (in the government's eyes)

the government places on *violating* that belief by participating in the accommodation scheme.

In its recent decision in *Holt* v. *Hobbs*, this Court "easily" found that a policy requiring an inmate to shave his face substantially burdened his religious belief that he must grow a beard. 135 S. Ct. 853, 862 (2015) (evaluating substantial burden under RLUIPA). The Court did not focus on how easy it would be for the Petitioner to shave his beard, in violation of his religious beliefs, but on the "serious disciplinary action" he would face if he refused to do so, in accordance with those beliefs. *Id.* Similarly, in *Sherbert* v. *Verner*, 374 U.S. 398, 403-404 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972)—the cases Congress enacted RFRA to restore, 42 U.S.C. § 2000bb(b)(1)—the Court weighed the denial of unemployment benefits and imposition of criminal sanctions imposed on claimants for adhering to their religious beliefs, not the incidental cost of working on Sunday or sending their children to school in violation of those beliefs, respectively.

In contrast, the Tenth Circuit fully ignored the substantial financial penalties Petitioners will face here if they adhere to their religious beliefs by participating in neither the contraceptive mandate nor the accommodation scheme. As this Court noted in *Hobby Lobby*, if the petitioners offered health plans that did not cover contraceptives, they would be taxed $100 a day for each affected individual; if the petitioners dropped insurance coverage and their employees qualified for a subsidy on a government-run exchange, the petitioners could face penalties of $2,000 per employee per year. 134 S. Ct. at 2775-2776 (citing 26 U.S.C. §§ 4980D, 4980H). Faced with such penalties, this Court had "little trouble concluding" that the petitioners' religious beliefs were substantially burdened. *Id.* at 2759 (if "heavy" penalties

"do not amount to a substantial burden, it is hard to see what would"). In that case, the Tenth Circuit reached the same conclusion. *Hobby Lobby*, 723 F.3d at 1140 ("Here, it is difficult to characterize the pressure as anything but substantial."). The Tenth Circuit in this case, however, ignored those same costs, evaluating the substantial burden by looking to the ease of violating one's conscience rather than at the degree of governmental coercion to violate it.

Unfortunately, as above, other Circuit Courts have committed the same error the Tenth Circuit committed here when considering the burden imposed by the accommodation scheme. Review by this Court is vital to ensure that courts appropriately evaluate the burdens to be considered in the RFRA analysis.

II. The Court Should Grant Certiorari Because The Tenth Circuit's Flawed Interpretation Of RFRA Could Have Sweeping, Detrimental Consequences On Religious Liberty If Upheld

A. The Tenth Circuit's Substantial Burden Analysis Revises Recognized Protections Of Free Exercise With An Approach By Which Courts Could Question Any Sincerely Held Belief

Courts have consistently refrained from evaluating the merits and validity of sincerely held religious beliefs, finding in a variety of contexts that the federal judiciary has "no business" addressing this question. *Hobby Lobby*, 134 S. Ct. at 2778; *see also Smith*, 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Thomas*, 450 U.S. at 716 (courts do not question "whether the petitioner ... correctly perceived the commands of [his or

her] faith"). This judicial restraint is particularly important with regard to review of regulatory schemes and their effects on religious beliefs, since "many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of 'police' or 'health' regulations reflecting the majority's views." *Sherbert*, 374 U.S. at 411 (Douglas, J., concurring).

The Tenth Circuit's approach to evaluating the burden on Petitioners in this case invites that forbidden inquiry. Although the court found Petitioners' beliefs "'sincere,'" it held that the accommodation "relieves Plaintiffs of their obligation" and would therefore not violate their religious beliefs. Pet. App. 18a, 54a. This method of analysis encourages courts to consider the relative quality of religious beliefs rather than the depth of the burden that the regulation would impose—an approach that intrudes into previously inviolable matters of faith. Applied to recent cases involving free exercise—where the burdened religious belief was unquestioned—the resulting modified assessment could lead to a different outcome. *E.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425 (2006) ("receiving communion through *hoasca*," a sacramental tea and a Schedule I controlled substance, was "[c]entral to the [religion's] faith"); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (finding, without inquiry, that "one of the principal forms of devotion [in the Santeria religion] is an animal sacrifice").

In contrast to the reasoning below, relevant considerations for a substantial burden analysis cannot consist only of the activity that a regulation mandates or proscribes, but must include the potential penalty for

refusing to abide by the regulation. To do otherwise is to weigh only part of the relevant effect. If judicial deliberation addresses only the regulatory requirement, which may seem objectively minimal, courts will increasingly be placed in a position of estimating the burden imposed solely by *compliance* with the regulation itself rather than the consequence of adherence to religious beliefs in *contravention* of the regulation. Such analysis ignores the impossible choice that burdensome regulations present—one must violate his or her religious beliefs or be subject to potentially severe penalties. *See Holt*, 135 S. Ct. at 862. Moreover, the step between assessing the burden on religious belief due to compliance with the regulatory requirement, and a deeper focus on the religious belief itself, is a short one—as this case demonstrates.

Thus, continued judicial application of a substantial burden analysis that focuses entirely on the regulatory action required, or prohibited, rather than focusing on the consequences when adherents act according to their beliefs and contrary to the regulation, is both flawed and dangerous. Such an approach opens the door for an inquiry that courts have consistently resisted. *E.g.*, *Hobby Lobby* 134 S. Ct. at 2778 ("Arrogating the authority to provide a binding national answer to this religious and philosophical question, [the government] in effect tell[s] the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step."); *Smith*, 494 U.S. at 887. In determining whether a substantial burden exists, courts could use the reasoning of the court below to question any and all sincerely held beliefs, potentially "rul[ing] that some religious adherents misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

B. The Court Should Clarify That "Accommodations" Must Be Treated The Same Way As Other Laws Challenged Under RFRA Because The Decision Below Could Incentivize Regulators To Add "Accommodations" That Do Not Truly Serve The Interests Of Those Who Seek To Exercise Their Religious Beliefs

Because the Tenth Circuit misconstrued the test under RFRA, resulting in its holding that the "accommodation" did not substantially burden Petitioners, the Court should clarify that a religious accommodation is subject to the same heightened standard of review as any law challenged under RFRA. Otherwise, the Tenth Circuit's decision could incentivize regulators to create similar religious "accommodations" that do not accomplish RFRA's goal of preserving religious liberty.

A religious believer's ability to act freely in accordance with her religious beliefs is of utmost importance. Indeed, "[f]ree exercise ... implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (citation omitted). Religious exemptions are critical to protecting this right to practice one's religion. This country has had a tradition of providing religious exemptions dating back to early America when certain religious objectors, predominantly Quakers, were exempted from taking oaths, military conscription, and removing their hats in court. *See* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-1473 (1990). Since *Roe* v. *Wade* was decided in 1973, Congress has passed numerous laws granting exemptions to those who object to abortion on

the basis of a religious belief, such as the Church Amendment, which prevents hospitals receiving federal funds from forced participation in abortion or sterilization. 42 U.S.C. § 300a-7. Responding to the Supreme Court's decision in *Smith*, Congress enacted RFRA, recognizing "free exercise of religion as an unalienable right" and affirming its conviction that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000bb(a)(1), (3). Thus, exemptions and legitimate accommodations for religious reasons are an indelible part of this country's tradition of protecting religion.

Despite the importance of exemptions for religious liberty, HHS chose to create a so-called "accommodation" that is not in fact an accommodation, but an alternative way to comply with the mandate. 79 Fed. Reg. 51,092, 51,092 (Aug. 27, 2014); 78 Fed. Reg. 39,870, 39,870 (July 2, 2013). The Tenth Circuit's flawed analysis of this purported "accommodation" under RFRA led to the incorrect conclusion that the "accommodation" adequately protects Petitioners' religious liberty, when in fact, it does not. Petitioners sincerely believe that under the accommodation scheme, they are participating in the provision of contraceptive coverage, which violates their religious beliefs. The court's reasoning seems based, in part, on the law's designation as an accommodation. Without full and appropriate consideration of an accommodation's substantial burden, a person with strong adherence to her beliefs is left with the same false choice as a direct regulation provides. The mandate's so-called "accommodation," therefore, has the perverse effect of curbing religious liberty.

As a result of the Tenth Circuit's incorrect analysis under RFRA of the "accommodation," regulators may resort to including similarly ineffective "accommoda-

tions" in regulatory regimes burdening religion that could not be successfully challenged in court. Such accommodations-in-name-only would not serve the important interests in protecting religious liberty that have been recognized by Congress and this Court. Indeed, the decision to create a separate and distinct "accommodation" for non-church religious organizations demonstrates the government's willingness to pursue its goals without using the least restrictive means available to accomplish them. While a sincere intent to protect religious freedom should be lauded, an "accommodation" similar to the one created by HHS is like a wolf in sheep's clothing. The Tenth Circuit's decision, as it stands, could establish a precedent detrimental to religious liberty by diluting the demanding substantial burden test and undermining the purpose of RFRA, which is to "ensure that interests in religious freedom are protected." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2015

No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, IN SUPPORT OF PETITIONERS LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.

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QUESTIONS PRESENTED

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S.Ct 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective—namely, the provision of no-cost contraceptives to the objector's employees?

3. Does the First Amendment allow HHS to discriminate among nonprofit religious employers who share the same sincere religious objections to the contraceptive mandate by exempting some religious employers while insisting that others comply?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES AS *AMICUS CURIAE* SUPPORTING THE PETITIONERS

Amicus curiae, The Council for Christian Colleges and Universities, respectfully submits that the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.[1]

INTEREST OF THE *AMICUS CURIAE*

The Council for Christian Colleges and Universities (CCCU) is an international association of Christ-centered colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, About CCCU, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 122 members in North America, all of which are regionally accredited colleges and universities with curricula rooted in the arts and sciences. In addition, the CCCU has another 61 affiliate member institutions with Christian missions. The CCCU's

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and letters of consent are on file with the Clerk's Office.

membership spans 33 states and 19 countries and has over 400,000 students enrolled and almost 2 million alumni.

CCCU members Southern Nazarene University, Oklahoma Wesleyan University, and Oklahoma Baptist University are the plaintiffs in one of the consolidated cases decided by the Tenth Circuit. Like all CCCU member institutions, these universities are committed to applying Christian doctrine and belief to all areas of human endeavor. That includes when life begins, the morality of ending an innocent life, and the responsibility of people and institutions for complicity with provision of abortifacient products. For that reason, in an unprecedented series of lawsuits, 15 CCCU member institutions have sought to enjoin application of the federal requirement that requires member institutions to provide their students and employees with cost-free access to FDA-approved abortifacients.[2]

The Tenth Circuit's decision is inconsistent with the religious liberty guaranteed by the Constitution and the Religious Freedom Restoration Act. As this Court recently explained, federal judges may not substitute their views of moral complicity for those of religious individuals and organizations. Such questions are the very type of government interference with the exercise of religion that the

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[2] The list of all CCCU member institutions' lawsuits is provided in Appendix A.

Religious Freedom Restoration Act was intended to prevent.

STATEMENT

Religious colleges and universities have played an important role in the history of our nation. Many of the nation's best-known institutions of higher education including Harvard, Yale, Princeton, and Rutgers were founded by churches and denominations. Throughout the nation's history, religious institutions of higher learning have wrestled with the moral and practical implications of Christianity. Because of this, for instance, religious institutions were motivated to train abolitionists in the early 1800s who helped contribute to the end of slavery decades later. For example, Oberlin College in 1850, then a Presbyterian college, was a hotbed for abolitionists. Harriet Beecher Stowe was the daughter of the president of Lane Seminary in Cincinnati, another center of abolitionist training in the 1830s.

The commitment to wrestle with the moral implications of being centers of learning with deep Christian convictions continues at religious colleges and universities throughout the country to this day. This commitment compels religious colleges and universities throughout the country to object to any participation in the provision of some or all of the contraceptive services required by the Affordable Care Act.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision is deeply flawed. Not only did the Court expropriate to the judiciary

the theological decision of when an organization is complicit in the taking of innocent life, but it also concluded that government is free to favor the free exercise of some religious organizations and not others, contrary to the Religious Freedom Restoration Act and the First Amendment.

The government's decision to exempt some religious employers from providing contraceptive coverage while requiring others to comply with the mandate demonstrates that the government's approach is not the least restrictive means necessary to advance its interests. The government concedes that when religious organizations that oppose the use of contraceptives generally, or a subset of some forms of FDA-approved contraceptives that may operate as abortifacients more specifically, hire co-religionists, their employees are "less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). And the government acknowledges that exempting certain religious employers does not impair its interests. Many religious organizations, including all of CCCU's member institutions, restrict their hiring for most or all positions to co-religionists. And these institutions' religious exercise is indistinguishable from that of exempt religious employers. Both teach the faith, engage in regular corporate worship, pray, and provide faith-based volunteer and social services. In other words, the government's distinction between which groups are exempt and which are administratively accommodated is arbitrary and unnecessary for the effectiveness of the Affordable Care Act. The government's interests will

not be frustrated by exempting Petitioners (and other similar religious organizations) from complying with the contraceptive mandate. Indeed, this is precisely what the Religious Freedom Restoration Act requires.

Worse yet, the government's discrimination between types of religious organizations is at odds with the First Amendment, which forbids arbitrary distinctions in the treatment of religious groups. The distinction the Departments draw between churches, other religious nonprofits, and non-religious nonprofits is both unprecedented and unconstitutional.

ARGUMENT

I. The Court should grant the petition because the government has forced religious nonprofits to choose between their religious duties.

The issues raised in the Petition have exceptional implications for the health-insurance decisions of religious nonprofits, including CCCU's member institutions. This is perhaps best demonstrated by the recent decision of Wheaton College to end its student health insurance plan. After an adverse ruling by the Seventh Circuit, *Wheaton Coll.* v. *Burwell*, 791 F.3d 792 (7th Cir. 2015), Wheaton made the difficult decision to terminate its student health insurance plan to avoid being complicit in providing abortifacient drugs and devices to Wheaton's students. Wheaton College Health Insurance Announcement (Jul. 10, 2015) *available at* http://tinyurl.com/qb29b8e (last visited

Aug. 24, 2015). Other religious colleges and universities have made similar painful decisions. See Libby A. Nelson, College Ends Student Health Plan, Inside Higher Ed (May 16, 2012) *available at* http://tinyurl.com/nna7jjc (last visited Aug. 24, 2015); Ave Maria University Discontinues Student Health Insurance Because of Federal Government's Mandate (May 21, 2012) *available at* http://tinyurl.com/p8r4fx2 (last visited Aug. 24, 2015). Because the issues raised are of exceptional importance to the nation's religious nonprofit institutions, the Court should grant the Petition.

II. Imposition of the contraceptive mandate on religious entities like Petitioners does not advance a compelling government interest in the least restrictive manner.

It is difficult, if not impossible, to understand how enforcing the contraceptive mandate against Petitioners is the least restrictive manner in which to protect an interest of the highest order (see 42 U.S.C. § 2000bb-1), given that the government has already conceded that it does no harm to exclude churches and integrated auxiliaries from the mandate.

Under the Affordable Care Act, employer-sponsored group health plans must meet minimum coverage requirements. These requirements include covering preventive health care services without requiring health plan participants or beneficiaries to share the costs of these services through copayments, deductibles, or co-insurance. 42 U.S.C. § 300gg-13.

The Departments of Health and Human Services, Labor, and Treasury issued regulations

that require employer-sponsored group health plans to include the full range of FDA-approved contraceptive services as preventive health care services. See 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); Health Resources and Services Administration, Women's Preventive Services Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Aug. 7, 2015).

The Departments exempted religious employers, but limited the scope of "religious employers" to those non-profit organizations that are exempt from filing informational tax returns under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (referencing 26 U.S.C. § 6033(a)(3)(A)(i) and (iii)). The Internal Revenue Code provides that all tax-exempt organizations must file informational tax returns except, inter alia, "churches, their integrated auxiliaries, and conventions or associations of churches, . . . or the exclusively religious activities of any religious order." 26 U.S.C. § 6033(a)(3)(A).

Congress requires tax-exempt nonprofit organizations to file informational tax returns "to provide the Internal Revenue Service with the information needed to enforce the tax laws." H.R. Rep. No. 413, at 36 (1969). In other words, informational returns are required to allow the IRS to police whether a given entity continues to be tax exempt. Congress exempted churches and their integrated auxiliaries from the requirement, likely with the purpose of avoiding any First Amendment issues. Congress was not seeking to determine which organizations were religious and which were not. And Congress did not create a tripartite system

in which churches and their integrated auxiliaries were exempt from filing informational returns, other religious nonprofits were required to provide modified informational returns, and nonreligious nonprofits were required to provide complete informational returns.

The Departments, however, have created that exact tripartite structure, distinguishing between religious employers and all other religious nonprofits. The Departments theorize that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. 39,870, 39,874 (July 2, 2013). The Departments offer no support for this assumption.

Recognizing that many religious organizations that are not "churches, their integrated auxiliaries, ... or ... religious orders" objected to providing coverage for some or all contraceptives, the Departments devised an "accommodation" for nonexempt religious employers. See 45 C.F.R. § 147.131(c)(1). A similar accommodation exists for religious colleges and universities that arrange for student health insurance coverage. 45 C.F.R. § 147.131(f). The accommodation allows certain religious nonprofit employers to fulfill their statutory obligation to provide coverage including all FDA-approved contraceptives. In other words, the employees of religious nonprofits who are accommodated still receive insurance coverage for

religiously objectionable contraceptives by virtue of their employment by the religious nonprofit.

Religious colleges and universities cannot be exempt employers. Even a religious college or university that is affiliated with a church or an association of churches cannot be an "integrated auxiliary" because colleges and universities receive more than 50% of their support from students and outside sources. See 26 C.F.R. § 1.6033-2(h)(1), (h)(4). Consequently, religious colleges and universities must comply with the contraceptive mandate.

The government's decision to exempt fully a category of entities—religious employers—regardless of whether they even object to contraceptive coverage cannot be squared with its refusal to exempt other religious groups like Petitioners who actually do have religious objections. See *Hobby Lobby*, 134 S. Ct. at 2777 n.33. The government offers no persuasive reason for "distinguishing between different religious believers—burdening one while [exempting] the other—when [the government] may treat both equally by offering both of them the same [exemption]." *Id.* at 2786 (Kennedy, J. concurring). After all, "[e]verything the government says about [exempt religious employers] applies in equal measure to" Petitioners. *Gonzales* v. *O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006).

The government concedes that exempting churches and their integrated auxiliaries "does not undermine the governmental interests furthered by the contraceptive coverage requirement [because

they] employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. This is no less true for religious non-profits. For instance, all CCCU member institutions, like many other religious nonprofits, restrict their hiring practices for full-time faculty, administrators, and in many instances, all positions, to Christians. See CCCU, Members & Affiliates: Membership Requirements, *available at* http://www.cccu.org/ members_and_affiliates (last visited Aug. 8, 2015) ("Member campuses must have a continuing institutional policy and practice . . . to hire as full-time faculty members and administrators (non-hourly staff) only persons who profess faith in Jesus Christ.").) Thus, the government cannot reasonably contend that extending the exemption to Petitioners and avoiding substantially burdening Petitioners' religious exercise would undermine the government's interests.

The government's method for distinguishing between exempt religious employers and religious employers who must comply with the contraceptive mandate bears no relation to the civil rights of religious organizations that the government is obligated to protect. The Internal Revenue Code exempts churches from filing informational tax returns but not other 501(c)(3) religious organizations. This is understandable given that requiring churches to provide detailed financial information including the identity of all their financial supporters would impose a substantial administrative burden on churches and could serve

to chill religious exercise. But it is beyond strange to apply that same distinction to decide which religious nonprofit organizations' civil rights deserve second-class treatment.

The government's distinction between religious nonprofits is even less defensible when applied to religious colleges and universities. Like houses of worship, the very purpose for which religious colleges and universities exist is "the propagation of a religious faith." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 503 (1979). For that reason, Petitioners and CCCU's member institutions engage in many of the same religious activities as houses of worship and their integrated auxiliaries including organized worship, corporate prayer, pastoral counseling, communal singing of religious songs, proselytizing, faith-based social service, and evangelistic outreach.

The government's distinction thus ultimately discriminates among "types of institutions on the basis of the nature of the religious practice [that the government perceives] these institutions are engaged in." *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008). Such distinctions are at the least constitutionally suspect. See *ibid.* The government's definition of religious employer favors religions, religious denominations, and religious organizations that fit neatly into the government's view of what constitutes religious activity, while disadvantaging groups that exercise their faith through other means such as fulfilling their educational missions or that for theological reasons are organized in ways that do not fit neatly within the government's box.

The absurdity of the Departments' distinction between exempt religious employers and non-exempt religious employers is shown by the treatment of seminaries. Seminaries that are affiliated with a church or association of churches are exempt from the contraceptive mandate because they are exempt from the internal-support requirement. See 26 C.F.R. § 1.6033-2(h)(5). Seminaries that are not affiliated with a church or association of churches are not exempt even though they provide exactly the same service (training ministers) and even if they hire only co-religionists as employees. If, for theological reasons, a seminary is established independent from any church, synagogue, or denomination, that seminary is not exempt. But if the seminary is affiliated with a denomination, it is exempt from the contraceptive mandate and the government concedes that would not frustrate its interests. Civil rights should not vary based upon whether that institution is or is not affiliated with a church or other house of worship.

In fact, the "religious employer" definition is itself offensive to religions when it defines religious employers essentially as including only houses of worship. This may be consistent with how the U.S. Department of Health and Human Services Administration views "religion." But wholly aside from the problems inherent with the accommodation, it likely violates RFRA for the Government to define religious employer in such a way as to exclude religious organizations like the CCCU's members.

The religious-employer exemption demonstrates that the government's accommodation for nonexempt

religious employers is not the least restrictive means for advancing the government's interests.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Tenth Circuit should be reversed.

Respectfully submitted,

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AUGUST 2015

APPENDIX A

The following CCCU member institutions have initiated litigation to enjoin the contraceptive mandate as to at least abortifacient contraceptive services:

1. *East Texas Baptist Univ.* v. *Sebelius*, 988 F. Supp. 2d 743 (S.D. Tex. 2013) (granting summary judgment against the government) *rev'd sub. nom. East Texas Baptist Univ. v. Burwell*, --- F.3d ---, 2015 WL 3852811 (5th Cir. July 9, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Houston Baptist University

   East Texas Baptist University

   Westminster Theological Seminary

2. *Southern Nazarene Univ.* v. *Sebelius*, No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub nom. Little Sisters of the Poor Home for the Aged, Denver, Colo.* v. *Burwell*, --- F.3d ---, 2015 WL 4232096 (10th Cir. Jul. 14, 2015) (cert. pet. pending)

   The following CCCU members are parties:

   Southern Nazarene University

   Oklahoma Baptist University

   Oklahoma Wesleyan University

3. *Geneva Coll.* v. *Sebelius*, 960 F. Supp. 2d 588 (W.D. Pa. 2013) (granting preliminary injunction against enforcement of the contraceptive mandate) *rev'd sub. nom. Geneva Coll.* v. *Secretary U.S. Dep't of Health & Human Servs.*, 778 F.3d 422 (3d Cir. 2015) (cert. pet. pending)

   The following CCCU member is a party:

   Geneva College

4. *Wheaton Coll.* v. *Burwell*, 50 F. Supp. 3d 939 (N.D. Ill. 2014) (denying preliminary injunction against enforcement of the contraceptive mandate) *aff'd* --- F.3d ---, 2015 WL 3988356 (7th Cir. 2015) (time for filing petition for writ of certiorari expires September 29, 2015)

   The following CCCU member is a party:

   Wheaton College

5. *Dordt Coll.* v. *Sebelius*, 22 F. Supp. 3d 934 (W.D. Ia. 2014) (granting preliminary injunction against enforcement of the contraceptive mandate) (appeal to Eighth Circuit is pending, argued in December 2014)

   The following CCCU members are parties:

   Dordt College

   Cornerstone University

6. *Grace Schs.* v. *Sebelius*, 988 F. Supp. 2d 935 (N.D. Ind. 2014) (granting preliminary injunction against enforcement of the contraceptive

mandate) (appeal to Seventh Circuit is pending, argued in December 2014)

The following CCCU members are parties:

Grace College

Biola University

7. *Franciscan Univ. of Steubenville* v. *Sebelius*, No. 2:12-CV-440, 2013 WL 1189854 (S.D. Ohio Mar. 22, 2013) (dismissed on mootness grounds)

The following CCCU member is a party:

Franciscan University of Steubenville

8. *School of the Ozarks, Inc.* v. *Sebelius*, --- F. Supp. 3d ---, 2015 WL 527671 (W.D. Mo. 2015) (granting summary judgment in favor of the government) (appeal to the Eighth Circuit is pending)

The following CCCU member is a party:

College of the Ozarks

9. *Louisiana Coll.* v. *Sebelius*, 38 F. Supp. 3d 766 (W.D. La. 2014) (granting summary judgment against government) (appeal to the Fifth Circuit is pending)

The following CCCU member is a party:

Louisiana College

10. *Colorado Christian Univ.* v. *Sebelius*, 51 F. Supp. 3d 1052 (D. Colo. 2014) (granting preliminary injunction against enforcement of the

contraceptive mandate) (appeal to the Tenth Circuit is pending)

The following CCCU member is a party:

Colorado Christian University

No. 15-105

In the Supreme Court of the United States

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v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR *AMICI CURIAE* DOMINICAN SISTERS OF MARY, MOTHER OF THE EUCHARIST; SISTERS OF LIFE; AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF THE PETITION FOR CERTIORARI

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INTEREST OF AMICI CURIAE[1]

The Dominican Sisters of Mary, Mother of the Eucharist is a Roman Catholic community of women religious based in Ann Arbor, Michigan. The community was founded in the Dominican tradition to spread the witness of religious life in accord with Saint John Paul II's vision for a New Evangelization. The Dominican Sisters profess the vows of poverty, chastity and obedience, along with a contemplative emphasis on Eucharistic adoration and Marian devotion, for the salvation of souls and the building of the Church throughout the world. Women religious have been an integral part of the history of Catholic education in the United States. The Dominican Sisters seek to continue the tradition of educating generations of young people in their Faith and most of all, to bring youth into deeper relationship with Christ through a faith formation that includes liturgical, doctrinal, spiritual and moral dimensions.

The Sisters of Life is a Roman Catholic community of contemplative and active women religious. John Cardinal O'Connor founded The Sisters of Life in 1991 for the protection and enhancement of the sacredness of every human life. In addition to the traditional vows of poverty, chastity, and obedience, The Sisters of Life are consecrated under a special fourth vow to protect

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[1] Counsel for all parties received at least 10 days notice of the intent to file this brief. Counsel for all parties have submitted blanket consent to the filing of *amicus* briefs in this case. No counsel for a party authored this brief in whole or in part. No person, other than *amici curiae*, their members, or their counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

and enhance the sacredness of human life. The Sisters of Life community includes 80 Sisters from around the world, who minister to pregnant women through hospitality, practical assistance, spiritual retreats, and healing. In addition, The Sisters of Life promote Roman Catholic teaching about the value of life in churches and communities through pro-life activities and a wide variety of educational programs.

The Judicial Education Project (JEP) is dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited power, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. In pursuit of these constitutional principles, JEP has filed *amicus curiae* briefs in numerous cases before the federal courts of appeals and the Supreme Court, including *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

SUMMARY OF ARGUMENT

The Affordable Care Act (ACA) is one of the most comprehensive and far-reaching legislative enactments in history, and its effects will be felt by almost every person and organization in the country for decades to come. This case squarely presents issues regarding the intersection of vast and intrusive government mandates with profound issues of religious freedom and government coercion that warrants the prompt intervention of the highest court in the land. The stakes could hardly be higher; the issues are ripe for decision. The Tenth Circuit's opinion is not only wrong for all of the many reasons the petitioners have demonstrated, but also represents a misreading and misapplication of the Court's most recent religious precedent on nearly the same issue in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775-76, 2779 (2014). The result can only be to confuse and undermine the clear principles set out in that case for the resolution of religious challenges to government dictates.

Amici wish to highlight the arbitrary nature of the decision by the Department of Health and Human Services (HHS) to base the availability of religious exemptions to the HHS contraceptive mandate ("HHS Mandate" or "Mandate") not on factors that go to an employer's religious character, but on the way it is treated in tax law. The HHS Mandate relies on several categories set forth in Internal Revenue Code[2] § 6033

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[2] Unless otherwise specified, any reference to "Code" in this brief refers to the Internal Revenue Code, which is found at Title 26 of the United States Code.

to distinguish between its treatment of different religious organizations. But the history and application of § 6033 show that the classification was solely intended to facilitate administration of the tax laws, not to draw a line between religious institutions whose free exercise was fully protected and those who received less consideration. In short, the availability of an exemption to the Mandate should turn on an organization's claim to religious exercise rights, not its tax filing obligations.

In fact, employment law has long managed to reconcile its own demanding requirements with religious exercise. Title VII of the Civil Rights Act of 1964 defines religious organizations who are exempt from other employment law much more broadly than does § 6033, and in a way that captures both the Little Sisters and *amici*. That definition has served as the model for other religious exemptions in employment law and regulations, and gives evidence of a readily-available alternative to the burdensome rule of the HHS Mandate.

ARGUMENT

The Government Wrongly Relies on § 6033's Return Filing Requirements to Govern Application of the Contraceptive Mandate

When HHS proposed its Mandate, the regulation triggered thousands of comments pointing out the serious risks to religious freedom if the government were to force employers opposed to contraception or abortion to provide contraceptive or abortifacient drugs or services. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,871 (July 2, 2013).

The initial version of the rule included no exemptions for religious groups. After serious First Amendment and Religious Freedom Restoration Act (RFRA) concerns were raised, however, the government settled on a tripartite division in which only houses of worship and affiliated entities would be entirely exempted from the mandate, while, in sharp contrast, other religious organizations would receive a mere "accommodation" to the rule, and all other employers would be required to follow the rule regardless of religious objection.[3]

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[3] This Court held in *Burwell v. Hobby Lobby Stores, Inc.* that even for-profit religious employers that do not fit within the not-for-profit categories of § 6033 enjoy religious freedom protection under RFRA and therefore must be granted accommodation for their religious beliefs. 134 S. Ct. 2751, 2768-69 (2014).

A. The HHS Mandate Wrongly Conditions the Religious Accommodation on Return Filing Status Under § 6033 of the Internal Revenue Code

The arbitrary division of religious institutions into more- and less-protected castes is at the heart of this case. Had HHS chosen to group the Little Sisters of the Poor with churches and integrated auxiliaries that have similar religious objections, the Sisters would have received a full exemption from the HHS Mandate and would not now be faced with choosing between violating a fundamental tenet of their religious faith or facing crushing fines. Ultimately, however, HHS officials made a momentous decision to distinguish between groups of religious organizations, even those with similar or identical religious beliefs and employment practices, giving some a full exemption from the rule but only allowing others a mere "accommodation" that would force these other groups to play an important role in imposing the HHS Mandate. Moreover, the regulators distinguished between the two classes by importing a distinction from tax law that has no relation to the religious freedom concerns that it purports to "accommodate."

Exempted organizations include only "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," as those terms are used in clauses (i) and (iii) of § 6033(a)(3)(A) of the Code, and organized and operated as nonprofit entities. 45 C.F.R. § 147.131(a) (citing I.R.C. § 6033(a)(3)(A)(i) & (iii)). Merely because they fall into a different category for tax filing purposes, other

religious organizations, including the Little Sisters, are offered an "accommodation" which does not address their religious objections to cooperating in providing contraceptives and abortifacients to their employees. While that distinction between different categories of religious organization may make sense in the tax context, it is neither designed nor appropriate for allocating free exercise burdens on religious employers.

B. Section 6033 Provides No Guidance Regarding the Treatment of Religious Organizations; It Merely Prescribes Return Filing Requirements for Tax-Exempt Organizations

Throughout the long history of taxation in the United States, the tax-writing committees of Congress have generally tried to avoid entangling the Internal Revenue Service in First Amendment religious considerations.

With the HHS contraceptive mandate, by contrast, an administrative agency of the government has chosen to demand that the Little Sisters provide their female employees and dependents (including minor dependents) contraceptives and abortifacients or authorize someone else to do so, while entirely exempting other religious organizations. It bases this crucial distinction on an entirely irrelevant fact: Section 6033 requires the Little Sisters to file with the Internal Revenue Service an annual return of income and expenses and other information relevant to its tax exemption but does not require churches and their affiliates to do so. As the following history makes clear, however, § 6033 provides no logical or legally defensible basis for distinguishing among religious institutions to

determine the degree of protection their religious freedom merits. The history shows, rather, that the provision is aimed solely at collecting information to enable the Internal Revenue Service to confirm that tax-exempt organizations are operating in accordance with the terms of their tax-exempt status.

Generally speaking, every exempt organization is required by § 6033(a)(1) of the Code to file an annual return of income and expenses and other information the Internal Revenue Service needs to determine whether the organization continues to qualify for the tax exemption and meets other tax-related requirements. Section 6033(a)(3)(A) specifies which organizations are statutorily exempt from that general rule.

When Congress first imposed an income tax on corporate entities, it specifically exempted from all taxation – and filing requirements – all "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes[.]" Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on rehearing*, 158 U.S. 601 (1895)); *see also* Revenue Act of 1909, ch. 6, § 38, 36 Stat. 11, 113 (1909). After the Sixteenth Amendment was ratified, the Revenue Act of 1913 preserved the exemption. Revenue Act of 1913, ch. 16, 38 Stat. 114, 172 (1913).

It was not until the 1943 Revenue Act that tax-exempt organizations were required to file any sort of information returns, and even then the requirement did not apply to "religious organization[s]" and "organization[s] . . . operated, supervised, or controlled

by or in connection with a religious organization." Revenue Act of 1943, ch. 63, § 117, 58 Stat. 21, 37 (1944).

Over time, it became clear that some tax-exempt organizations were engaging in income-producing activity unrelated to their exempt purpose, and thus competing at an unfair advantage against taxable entities. So in 1950, Congress added the unrelated business income tax (UBIT) provisions to the Code, requiring otherwise tax-exempt organizations, including religious institutions, to file income tax returns and pay taxes on their unrelated business taxable income. Revenue Act of 1950, ch. 994, 64 Stat. 906, 948 (1950). These UBIT returns were entirely separate from the information returns filed to report on nontaxable exempt operations. "Churches" were excluded from the UBIT return requirement, but the statute did not define "church." Thus, although non-church religious organizations now had to file UBIT returns, the broad category of religious organizations as a whole remained exempt from filing information returns.

In 1969, in response to the increasing complexity and sophistication of tax-exempt entities and actual or perceived abuses of their tax status, the Tax Reform Act of 1969 (the "1969 Act") made major changes to the taxation of otherwise tax-exempt organizations. Tax Reform Act of 1969, tit. I, § 101, 83 Stat. 487, 494-96 (1969). Among them was a narrowing of the information return filing exemption for religious organizations. Now it applied only to "churches, their integrated auxiliaries, and conventions or associations

of churches" and "the exclusively religious activities of any religious order."[4] *See id.* at 520.

At the same time, though, Congress tried to avoid giving the Internal Revenue Service power to interfere with the free exercise of religion. As the Supreme Court stated the following year,

> For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. . . . Few concepts are more deeply embedded in the fabric of our national life beginning with pre-revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally, so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 676 (1970).

The General Explanation of the Tax Reform Act of 1969 (also known as the 1969 Blue Book) noted the new legislation's narrow information return exemption for church-related organizations, observing that "[i]n addition to these three categories, the Treasury Department may exempt other type of organizations from the filing requirements if it concludes that the information is not of significant value." Staff of the Joint Committee on Internal Revenue Taxation, 91st

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[4] These statutory criteria remain today in clauses (i) and (ii) of § 6033(a)(3)(A) and constitute the sole basis for exemption from the HHS Mandate.

Cong., General Explanation of the Tax Reform Act of 1969 53 (Comm. print 1970) ("1969 Blue Book"), *available at* https://www.jct.gov/publications.html?func=startdown&id=2406. This discretionary authority of the Treasury was codified in § 6033(a)(3)(B), which continues to provide that the Treasury Secretary may relieve any organization from filing an information return "where he determines that such filing is not necessary to the efficient administration of the internal revenue laws."

In fact, pursuant to this discretionary authority, the Treasury has exempted certain other non-church religious organizations from information return filing because it determined the information was not necessary for administration of the tax laws.[5] In just one of the anomalies created by HHS's restrictive criteria for the HHS Mandate exemption, these religious organizations are just as legally exempt from information return filing as church-related organizations, but yet are not eligible for an exemption from the HHS Mandate solely because their filing

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[5] These organizations include, in general terms, (i) mission societies sponsored by or affiliated with a church and primarily acting in or towards foreign countries, (ii) below-college-level educational institutions affiliated with a church or operated by a religious order, and (iii) organizations operated, supervised, or controlled by church-related organizations and that are engaged exclusively in financing, funding, or managing funds for such organizations, or that maintain retirement insurance plans primarily for such organizations where more than half of the covered individuals are directly employed by those organizations, or more than 50 percent of the assets are contributed by, or held for the benefit of, employees of those organizations. *See* Treas. Reg. § 1.6033-6(b)(2)(iii), (iv); Rev. Proc. 96-10, 1996-1 C.B. 577.

exemption is discretionary under § 6033(a)(3)(B) rather than statutory under § 6033(a)(3)(A)(i) and (iii) as required by the HHS Mandate exemption.

Even the extensive 1969 Act statutory changes, however, were not uniform in their treatment of church-related organizations and other religious organizations, as they varied based upon Congressional views on sound tax policy and the Department of Treasury's requirements for information. Accordingly, although church-related organizations remained exempt from filing information returns under the narrower exemptions in § 6033(a), Congress revoked the general religious organization exemption from filing UBIT returns for *all* religious organizations, even church-related organizations. Congress took this step because it believed that it was inappropriate even for church-related organizations to be exempt from UBIT when

> . . . exempt organizations not subject to the unrelated business income tax—such as churches, social clubs, fraternal beneficiary societies, etc.—began to engage in substantial commercial activity. For example, numerous business activities of churches were brought to the attention of the Congress. Some churches are engaged in operating publishing houses, hotels, factories, radio and TV stations, parking lots, newspapers, bakeries, restaurants, etc.

1969 Blue Book 66-67. The development of § 6033(a)(3)'s exemptions from otherwise applicable information filing requirements, especially in context with the imposition of UBIT filing requirements regardless of the type of religious organization, makes

clear that the sole purpose of return filing is to provide the Internal Revenue Service with the information it needs to administer and enforce the tax laws, nothing more.

C. Section 6033 Is Not a Classification of Religious Rights

The government uses the distinctions drawn in § 6033(a)(3)(A) to distinguish between religious groups who are entirely exempt from the HHS mandate and those whom it will only "accommodate." But those provisions in no way address the religious freedoms at the heart of which groups should not be subject to the HHS Mandate.

Section 6033(a)(3)(A) provides exceptions to the general rule of § 6033(a)(1), which requires tax-exempt organizations to file an annual information return. The filing of this return has nothing to do with religious exercise and everything to do with administration of the tax laws.

The general rule for the tax filing requirements of tax-exempt organizations makes that purpose explicit:

> . . . every organization exempt from taxation under § 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information *for the purpose of carrying out the internal revenue laws* as the Secretary may by forms or regulations prescribe, and shall keep such records, render under oath such statements, make such other returns, and

> comply with such rules and regulations as the Secretary may from time to time prescribe . . . .

I.R.C. § 6033(a)(1) (emphasis added).

The 1969 Blue Book emphasized the information reporting purpose of § 6033:

> The primary purpose of these requirements was to provide the Internal Revenue Service with the information needed to enforce the tax laws. The Congress concluded that experience of the past two decades indicated that more information is needed on a more current basis from more organizations and that this information should be made more readily available to the public, including State officials.

1969 Blue Book 52, 53. Nothing in the Committee Report suggests that a religious organization's obligation to file an annual information return with the Internal Revenue Service has any purpose other than facilitating administration of the tax laws.

In crafting the Mandate, HHS identified religious considerations in its own explanation for the HHS Mandate exemption. It noted that forcing religious employers to cover contraceptive services implicated religious freedoms, but then made the unsupported assertion that the relationship of a religious employer with its employees is unique for houses of worship and their affiliates as defined under the tax code.

But whether an organization is a "church" for purposes of § 6033 and other areas of the tax code, or a religious organization like Little Sisters and *amici*, has only to do with its structure and its religious activities,

not the relative religiousness of the organization or its rank-and-file employees.[6] Furthermore, after a 10-year fight and losses in litigation, the Treasury finally abandoned the position that the activities of an "integrated auxiliary" of a church, one of the entities exempted under the HHS Mandate, must be "exclusively religious." *See, e.g., Lutheran Social Service of Minn. v. United States*, 758 F.2d 1283 (8th Cir. 1985) (striking down "exclusively religious" requirement). Indeed, such church auxiliaries often have no purpose relating to religious teaching or ceremonies, and may be engaged in the same types of community service activities and have the same types of religiously-motivated members as the Little Sisters, yet such auxiliaries qualify under § 6033(a)(3)(A)(i) and the Little Sisters do not. In the face of these similarities, and despite the fact that religious considerations were the reason for the HHS Mandate exemption in the first place, HHS has stubbornly continued to base availability of the exemption solely on an organization's tax filing obligations.

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[6] *See, e.g., American Guidance Foundation, Inc. v. United States*, 490 F. Supp. 304, 306 (D.D.C. 1980) (requiring "associational" activities that mean "[a]t a minimum, a church includes a body of believers or communicants that assembles regularly in order to worship.").

D. HHS Ignored the More Suitable Definition of Religious Organizations Already Codified in Title VII

The Little Sisters are subject to the provisions of the Affordable Care Act not because they are taxpayers, but because they are employers. And federal law already provides guidance on the proper application of employment laws to religious employers in Title VII of the Civil Rights Act of 1964. Long before the ACA was passed, federal employment law had already dealt with the question of how to accommodate religious organizations in the context of its employment mandates, and did so in way that was much more respectful of the scope of free religious exercise and the range of religious devotion in the United States.

Recognizing the unique attributes of religious devotion and expression, Title VII of the Civil Rights Act of 1964 specifically exempts religious employers from antidiscrimination laws that apply to secular employers. These provisions allow religious employers to hire only people who share their religious beliefs without being subject to the penalties that apply to non-religious employers. 42 U.S.C. § 2000e-1. The law defines broadly which religious employers fit within this exemption:

> . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association,

> educational institution, or society of its activities.

Id. This exemption would clearly cover both Little Sisters of the Poor.

Indeed, other employment laws also track Title VII's definitions of religious organizations. The Americans with Disabilities Act, for example, similarly protects the ability of "a religious corporation, association, educational institution, or society" to hire employees who share their beliefs, 42 U.S.C. § 12113(d)(1), as do regulations of federal contractors and subcontractors, 48 C.F.R. § 22.807(b)(7), 41 C.F.R. § 60-1.5(a)(5), and recipients of Small Business Association assistance. 13 C.F.R. § 113.3-1(h).

Viewed in light of these other exemptions, the HHS Mandate's list of religious classifications is absurd. Religious employers like the Little Sisters of the Poor are expressly permitted by Title VII to hire only people who do not want contraceptives, but government penalties can drive them out of existence for failing to provide them.[7]

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[7] The Court has said in the context of a less sensitive First Amendment freedom, the protection of commercial speech, that "the flaw in the Government's case is more fundamental: The operation of [the statute] and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Greater New Orleans Broadcasting Association, Inc., et al. v. United States, et al.*, 527 U.S. 173, 190 (1999). In that case, one law banned advertising of casinos, and another one encouraged tribal casino gambling. The resulting havoc was considerably less troubling than that wreaked by the HHS mandate. As the Court noted in *Hobby Lobby*, the ACA itself, and the contraceptive mandate in particular, is riddled with exceptions and exemptions. 134 S. Ct. 2751, 2763-64 (2014).

Just as incomprehensible is HHS' explanation for limiting exemptions to houses of worship and related auxiliaries under § 6033. In its responses to more than 400,000 comments on proposed regulations governing coverage of certain preventive services, HHS opined:

> Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

78 Fed. Reg. 39,870, 39,874.

But if the likelihood that most employees share the organization's religious beliefs was the reason for exempting an organization from the HHS Mandate, it makes no sense for those exemptions to track *tax law* – and specifically the language dealing with *filing returns* – rather than the very employment laws that deal with hiring people of shared faith in the first place.

It is unsurprising that employment law would include broad religious exemptions. Employment law has the potential to interfere directly with these institutions' religious exercise by placing the government between religious institutions and the employees who carry out their mission. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 705-07 (2012) (applying employment discrimination law to churches "interferes with the internal governance of the church, depriving

the church of control over the selection of those who will personify its beliefs.").

Ironically, taxing religious organizations directly and providing free contraceptives from a general fund could have been less intrusive (at least in principle) than regulating religious entities' employment decisions. Mindful that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819) (Marshall, J.), tax laws are less burdensome to religious exercise than the HHS Mandate. The tax laws do not require a religious organization to provide or assist in providing any benefits, or to engage in any activities, that it doesn't already. HHS' heavy-handed mandate, by contrast, insists the Little Sisters affirmatively act in contravention of their religious principles.

CONCLUSION

The HHS Mandate threatens the Little Sisters with fines that are more than just a substantial burden; they are a death sentence. Yet the only basis that HHS provides for treating the Little Sisters as a second-class religious institution is its classification for purposes of a tax reporting requirement having nothing to do with the relationship between employers and their employees and certainly nothing to with the Mandate.

The Little Sisters and other religious orders devote their entire financial resources to the accomplishment of their purpose – in the case of the Little Sisters, care of the elderly; in the case of Sisters of Life, care of pregnant women and their newborns; in the case of the Dominican Sisters, education of children – and to the food, clothing and shelter of the religious women

engaged in the mission. The government's failure to acknowledge and respect the Little Sisters' and similarly situated religious orders' adherence to a fundamental teaching of the faith to which they have dedicated their lives would deprive American communities of their valuable contributions to society.

Even if HHS was within its authority to require most employers to provide contraceptive coverage to female employees, it selected and applied irrelevant tax-law criteria in determining which employers are entitled to a religious exemption. Rather than pull irrelevant classifications from thin air, HHS should have adopted the relevant criteria already expressed in Title VII.

The Court should grant the petition.

Respectfully submitted,

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No. 15-105

IN THE

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LITTLE SISTERS OF THE POOR
HOME FOR THE AGED et al,
Petitioners,

v.

SYLVIA BURWELL,
SECRETARY OF HEALTH AND HUMAN SERVICES et al,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to this Court's Rule 37.3(b), amicus Foundation for Moral Law requests leave of the Court to file this brief amicus curiae in support of Petitioners. Emailed consent to the filing of this brief has been granted by counsel for the Petitioners, but no formalized written consent has been received by counsel for amicus from Petitioner or Respondent which necessitated the filing of this motion along with Counsel of Record's brief *Amicus Curiae*.

On this 24th day of August, 2015.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes the Free Exercise Clause of the First Amendment protects the right of the Little Sisters of the Poor and other nonprofit corporations to refrain from providing, paying for, or otherwise authorizing or triggering abortion and contraception coverage.

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Framers understood the First Amendment to maximize the protection of free exercise of religion throughout this nation. To ensure that protection was not compromised in the modern era, Congress enacted the Religious Freedom Restoration Act to prevent government from substantially burdening free exercise without a compelling interest that cannot be achieved by less restrictive means.

The Little Sisters of the Poor and other petitioners strongly believe they are to regard human life as sacred, and they believe human life begins at conception. Accordingly, a law that requires them to provide, pay for, or otherwise authorize or trigger abortion/conception substantially burdens their religious convictions.

Telling the Little Sisters that the opt-out provision of the Affordable Care Act (ACA) does not substantially burden their free exercise of religion, the Tenth Circuit has in effect defined the Little Sisters' religious beliefs, for it is impossible to conclude that a burden is insubstantial without effectively defining the belief it burdens. And when this decision is read in concert with *Burwell v. Hobby Lobby*, ___ U.S. ___, 134 S.Ct. 2751 (2014), it has the anomalous result of making for-profit corporations more free to be exempt from the ACA than nonprofits.

In reaching this bizarre result, the Tenth Circuit has misunderstood and undermined decisions of this Court the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause of the First Amendment.

ARGUMENT

Introduction

Suppose a person who believes on the basis of religious conviction that all killing is wrong, is ordered by government to shoot a prisoner. He objects that this places a substantial burden on his free exercise of religion. Suppose, further, that this person is given an alternative -- instead of personally killing the prisoner, he can pay another person $1,000 to kill the prisoner. He objects that he is still facilitating murder and this substantially burdens his free exercise.

So then he is given a third alternative: he can "opt out" of the killing by signing a paper stating his objection, and someone else will be ordered to kill the prisoner instead. Some might find this acceptable, or at least minimally burdensome, but some would not. Some would say that what matters is not who does the killing, nor who pays for the killing; what matters is that the killing is done at all, and this person's part in authorizing or triggering the killing, regardless of how remote or minimal it may seem to some, compromises and substantially burdens a religious conviction so fundamental as the sanctity of human life.

Amicus suggests that the position of the Little Sisters of the Poor is comparable to that of the person who faces this third alternative -- opting out of killing, but by doing so facilitating and triggering abortion/contraception which the Little Sisters believe is a flagrant violation of the sanctity of human life.

Amicus assumes counsel for Little Sisters of the Poor will address the details of the Little Sisters' insurance coverage as compared with that of the other Petitioners. Instead, *Amicus* will address the issue of whether the Affordable Care Act (ACA) imposes a substantial burden upon the Little Sisters by forcing them to opt out of abortion/contraception coverage and trigger coverage by a Third-Party Administrator (TPA).

I. EVEN IF THE "OPT-OUT" PROVISION HAS REDUCED THE BRUDEN ON FREE EXERCISE OF RELIGION, THE BURDEN IS STILL SUBSTANTIAL.

A previous Tenth Circuit decision cited by the court below is not on point. *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), involved a man who shot an eagle without a permit for use in a tribal religious ceremony. The Tenth Circuit expressed skepticism that the permit requirement constituted a substantial burden but did not decide that issue because Mr. Friday had not raised it.

And the Tenth Circuit's citation and misreading of this Court's recent decision in *Holt v. Hobbs*, ___ U.S. ___, 135 S.Ct. 853 (2015), reflects the Tenth Circuit's misunderstanding of the accommodation requirement regarding the First Amendment, the Religious Freedom Restoration Act (RFRA), and the decisions of this Court. Holt challenged the prison's prohibition on inmate beards, saying the prohibition violated his Muslim faith; prison officials resisted, saying the prohibition was necessary to prevent inmates from concealing weapons. Holt proposed a half-inch beard compromise, which the prison refused but the Court accepted.

The Tenth Circuit reads *Holt* to say that so long as the government has offered an accommodation or compromise, its duty under the First Amendment and RFRA is satisfied. But that is not what this Court said. This Court accepted the accommodation because Holt said it was acceptable, that is, his religion required him to have a beard, the prison's no-beards rule substantially burdened the exercise of his religion, but a requirement that he limit his beard to one-half inch was not a substantial burden as even Holt agreed. In other word, this Court has said the government's accommodation must either eliminate the burden or reduce the burden so it is no longer substantial. In this case, the burden on the Little Sisters is still substantial.

Amicus believes the Tenth Circuit ruling below conflicts with and undermines landmark decisions of this Court, and therefore this Court should grant certiorari and reaffirm these decisions as the true

meaning of the First Amendment. Furthermore, the companion cases that the Tenth Circuit decided along with the case at hand, demonstrate that the federal district courts in the Tenth Circuit are split and uncertain about this issue. Moreover, there are innumerable organizations and individuals throughout the nation who are affected by the ACA and need to know whether the ACA applies to them and what it requires of them.

The Tenth Circuit ruling below says the question whether a burden on free exercise of religion is substantial is an objective question that the Court must answer. *Amicus* believes that the question of the substantiality of the burden depends to a very large extent on the nature of the religious belief itself, and therefore the person's or organization's perception of the burden as substantial is entitled to considerable discretion by the courts.

II. THE BALLARD DECISION PROHIBITS THE GOVERNMENT FROM CHALLENGING THE OBJECTIVE TRUTH OF A RELIGIOUS CONVICTION.

Two landmark decisions by this Court support our contention that the courts should give very considerable deference to the Little Sisters' claim that the opt-out requirement imposes a substantial burden on their free exercise of religion. The first of these landmark cases is *Ballard et al. v. United States*, 322 U.S. 78 (1944). *Ballard* had been convicted of mail fraud because, as the founder and president of the "I Am" movement, he had sent out

mailings in which he claimed that he was in communication with angels and had the power to heal persons afflicted with many diseases, and that, in return for a donation, he would intercede on the donor's behalf and heal the donor. The trial court had instructed the jury that they could not consider whether or not *Ballard*'s claims were objectively true, but they could consider whether or not *Ballard* sincerely believed the claims. The jury concluded that *Ballard* did not sincerely believe the claims and therefore they found him guilty of fraud.

Speaking for the Court, Justice Douglas reversed the conviction. Fraud consists of a false statement, known by the defendant to be false, communicated to a third party with intent that the third party act upon that statement to his/her detriment. However, Justice Douglas said, the statement must be objectively false, and because the jury is not authorized to pass judgment on the truth or falsity of a religious statement, they cannot satisfy the first element of fraud. The Court ruled at ___:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728, 20 L.Ed. 666. The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303,

60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be"' Id., 310 U.S. at pages 303, 304, 60 S.Ct. at page 903, 84 L.Ed. 1213, 128 A.L.R. 1352. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education by Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the

power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81. As stated in *Davis*

> *v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637. "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." See *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438.

Justice Jackson, in his dissent at *Id.* ___, went even further than Justice Douglas in his insistence that the government may not evaluate or even inquire into a person's religious beliefs and statements:

> ...[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew something to be false which it cannot prove to be false? If we try religious

sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experience provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those w

hose field of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among his judges are likely not to understand and are almost certain not to believe him.

And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief in something concerning which doubt is theoretically possible." Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter

bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they

feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of

> them are sometimes accused of taking their orthodoxy with a grain of salt.
>
> I would dismiss the indictment and have done with this business of judicially examining other people's faiths.

The Tenth Circuit has not questioned the sincerity of the Little Sisters' religious beliefs, but they concluded that the burden imposed upon their beliefs by the ACA was not substantial because of the "opt out" provision. However, in so doing, the Tenth Circuit has questioned the nature of the Little Sisters' religious beliefs.

It is impossible to determine whether a law imposes a substantial burden on a person's religious beliefs, without determining what that person believes. Suppose, for example, that Congress passes a bill that prohibits baptism possibly claiming that baptism spreads infectious diseases or causes psychological trauma. That would burden the free exercise of religion for those churches and individuals that practice infant baptism. But would it be a substantial burden? That might depend upon the significance of baptism in various church traditions. Some churches consider baptism to be (A) only a sign or symbol. Others believe baptism is (B) a means of grace by which God conveys saving faith to the recipient. Still others believe baptism is (C) closely related to salvation, or, for a few churches, (D) essential to salvation. Those who believe (A) would likely say that although baptism is a Scriptural

command, the lack of baptism does not affect one's eternal salvation. Those who believe (D) would say baptism or the lack thereof determines one's eternal destiny in heaven or hell. Those who believe (B) and (C) would place the significance of baptism somewhere between (A) and (D).

Applying the substantial burden test, a court might conclude that a law prohibiting baptism is a substantial burden on churches and individuals who believe (D), not a substantial burden for those who believe (A), "sort of substantial" for those who believe (C), and "borderline" for those who believe (B). But in order to reach these conclusions, the court would have to engage in detailed study of the religious beliefs and traditions of each of these churches, recognizing that even within a denomination not all members, pastors, and theologians believe exactly the same.

The Little Sisters claim that providing abortion and contraception coverage violates their religious beliefs and their exercise of those beliefs. Neither the Government nor the Court has questioned the sincerity of their claim. The Little Sisters claim that "opting out" and thereby transferring the responsibility for coverage to a TPA is a substantial burden on their religious beliefs and their exercise of those beliefs. Rejecting that claim, the Court is in effect saying that either (1) the Little Sisters are insincere in claiming a substantial burden, or (2) the Little Sisters are incorrect in claiming a substantial burden.

The Tenth Circuit says the question of the party's sincerity is subjective but the question of the substantiality of the burden is objective. However, the substantiality of the burden cannot be determined apart from an understanding of the party's religious beliefs. What is the nature and source of the religious objection? Does the party believe adherence to the law in question would simply be unwise? Does the party believe it would violate the command of the Church? Does the party believe it would violate the command of God?

And what are the consequences of adhering to the law in question? Does it incur eternal damnation? Does it incur Heaven's judgment here on earth? Could it lead to excommunication or other Church discipline? Or is God's disapproval alone enough to incur a substantial burden?

And more to the point, does the Court have either the competence or the jurisdiction to examine and pass judgment on these questions? And can the Court analyze and pass judgment on these questions without engaging in the kind of "excessive entanglement" of government with religion that the Court says government should avoid?

To a secular-minded legislator or judge, the simple act of signing a form opting out of abortion/contraception coverage may seem too insignificant to constitute a substantial burden. But to parties like the Little Sisters who have devoted their lives to the service of Christ and His Church and who devoutly believe abortion and contraception

are anathema in the eyes of God, it seems to be a total betrayal of their Catholic faith. The significance of disobeying God and following the law have to be evaluated in terms of the importance of this tenet as perceived by the party.

Amicus does not deny the theoretical possibility that there could be a case somewhere in which a party claims a burden is substantial when it really is not substantial. But such cases would have to be extremely rare. The very fact that the party is willing to undertake the expense in time and resources, as well as the inconvenience and trauma, of extended litigation in court, should create a presumption that the burden is substantial.

The purpose of this discussion in the light of *Ballard* is to demonstrate that when, as here, a party claims that a law imposes a substantial burden upon the exercise of the party's religious beliefs, and where, as here, there is absolutely no evidence and in fact absolutely no suggestion that the party's claim is insincere, the Court should give considerable deference to the party's claim that the law imposes a substantial burden upon the exercise of his or her religious beliefs.

III. THE THOMAS CASE HELD THAT COURTS MUST GIVE CONSIDERABLE DEFERENCE TO A PARTY'S CLAIM OF A RELIGIOUS BELIEF.

The Tenth Circuit ruling cites *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), but the Tenth Circuit

decision is inconsistent with *Thomas*. A Jehovah's Witness, *Thomas* worked for Blaw-Knox fabricating sheet metal. After that division of the company closed, *Thomas* was transferred to a division that worked on tank turrets, at which time his employment was terminated because he refused to build tank turrets. He claimed unemployment compensation, and his claim was denied because his refusal to work constituted misconduct. He claimed this denial violated the First Amendment because his refusal was based upon his pacifist religious beliefs. He testified at 710:

> Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do. . . .
>
> A. That's right, that's right when . . . I'm daily faced with the knowledge that these are tanks. . . .
>
> * * * *
>
> A. I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . religious principles that . . I have come to learn. . . .

The Indiana Supreme Court denied his free exercise claim, stating that the basis for his beliefs was unclear but more a personal philosophical choice than a religious conviction: "A personal philosophical choice, rather than a religious choice, does not rise to the level of a first amendment claim." *Id.* at 713. The Indiana Court concluded that *Thomas* was

"struggling" with his beliefs and that he could not "articulate" them precisely. The Court also noted that *Thomas* was unable to articulate why he objected to building tan'

In an 8-1 decision, the U.S. Supreme Court reversed the Indiana Supreme Court. The Court stated at 714,

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. [n7] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The lower court noted that *Thomas* was willing to work at the foundry even though the foundry produced steel that would ultimately be used to make weapons. But as this Court observed at 714-15,

> ...[T]he Indiana court seems to have placed considerable reliance on the facts that *Thomas* was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted,

for example, that *Thomas* admitted before the referee that he would not object to

> working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131. The court found this position inconsistent with *Thomas'* stated opposition to participation in the production of armaments. But *Thomas'* statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that *Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a

> more sophisticated person might employ.

Another Jehovah's Witness also worked on tank turrets for Blaw-Knox. This man testified that he saw no conflict between this work and his religious beliefs and that he had never been admonished, disciplined, or excommunicated because of this work. The lower court reasoned that *Thomas*'s beliefs could not be religious because another adherent of same religion obviously did not share his beliefs. But this Court disagreed, stating at 715-16,

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and

> judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The Little Sisters claim their objection to providing abortion/contraception coverage is religious. The Tenth Circuit does not deny that their objection is both religious and sincere.

The Little Sisters claim the opt-out provision also violates their sincere religious convictions. Again, the Tenth Circuit does not deny the sincerity of that claim.

The Little Sisters claim the opt-out provision constitutes a substantial burden on their religious beliefs -- possibly a lesser burden than would exist if the Affordable Care Act did not include the opt-out provision, but a substantial burden nevertheless. The Tenth Circuit does not deny that the Little Sisters sincerely believe the burden is substantial, but they nevertheless contend that the Little Sisters' belief that the burden is substantial is objectively false. Amicus respectfully contends that the Tenth Circuit is mistaken in this holding.

The nature of a religious belief, and the degree to which a law burdens that belief, cannot be neatly separated. The Little Sisters base their beliefs and

practices on the commands of God as revealed through the Roman Catholic Church. They believe they would sin against God and the Church if they were to provide abortion/contraception coverage, and they believe just as sincerely that they would sin against God and the Church if they were to sign an opt-out form or similar document. They, not the Court, must determine whether signing an opt-out form is a sin, and if so, how serious a sin.

When the Tenth Circuit tells the Little Sisters this burden is not substantial, the Court is essentially telling the Little Sisters what they believe. The Court is essentially telling the Little Sisters that signing the opt-out form would not be a serious sin, and that their belief that it is a serious sin is objectively false.

This comes close to telling the Little Sisters what doctrines and practices are central to their faith and what doctrines and practices are not central. This involves a detailed analysis of the Little Sisters' religious doctrine which the Tenth Circuit has neither the competence nor the jurisdiction to undertake.

The centrality of a doctrine or practice may vary from one denomination to another, and may even vary among individuals within the same denomination. Like the example of baptism given earlier, the significance of Communion would vary among denominations and individuals. Roman Catholics consider the bread and wine of Communion

to be the transubstantiated Body and Blood of Jesus Christ. Lutherans consider Communion to be a means of grace involving the "real presence" of Christ in the sacrament. Others such as Baptists generally regard Communion to be only an ordinance and the bread and wine (or grape juice) to be only symbols. Analyzing these doctrines within the broader concept of faith might lead a court to consider Communion a "central" doctrine or practice for Catholics, possibly central for Lutherans, and not central for Baptists. But as this Court recognized in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."2

And the question of centrality is closely related to the substantiality of the burden. Suppose the government allowed churches to serve Communion but prohibited (or required) the use of wine instead of grape juice. Would that be a substantial burden? To answer that question, a court would have to analyze the nature of the practice of Communion, both

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2 The Tenth Circuit cited this case and further quoted this Court as saying "We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Id.* However, the Tenth Circuit failed to note that this Court did not decide the substantiality issue because it based its decision on other considerations.

generally and in that denomination, the history of that practice, the doctrinal reasons for the practice, and the consequences (in the view of church adherents) of violating that practice. That kind of study is the "excessive entanglement" this Court has said government must avoid, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Tenth Circuit has no constitutional authority to tell the Little Sisters what they believe, nor how serious or substantial departures from their beliefs must be. Unless there is evidence that the Little Sisters are insincere -- and there is none -- their claim that the opt-out form still constitutes a substantial burden must be given very considerable deference. To paraphrase what the Supreme Court said in *Thomas*, there could be a claim of substantial burden that is so bizarre, so obviously contrived, and so obviously insincere, as not to be entitled to First Amendment protection; but that is not the case here. Courts are not arbiters of scriptural interpretation, and the Tenth Circuit must not be allowed to tell the Little Sisters what they believe.

IV. THE DECISION BELOW MEANS NONPROFIT CORPORATIONS HAVE LESS RELIGIOUS FREEDOM THAN FOR-PROFIT CORPORATIONS.

If the Tenth Circuit decision is allowed to stand, the result would be an anomaly. This Court held in *Burwell v. Hobby Lobby*, that a for-profit closely-held corporation is entitled to an exemption from providing abortion/contraception coverage in violation of its religious beliefs. Although the reason

is partly based on the wording of the Affordable Care Act itself, the result of this Court's *Hobby Lobby* decision coupled with the Tenth Circuit's Little Sisters decision is that for-profit closely-held corporations are exempt from this coverage but nonprofit corporations must sign an opt-out form, meaning for-profit corporations have greater First Amendment protection than nonprofit corporations, all for abortion/contraception coverage that most of the Little Sisters' employees probably do not need or want and are offended that it has to be part of their policies. This certainly cannot be the intent of the Framers of the First Amendment, nor of the Congress that adopted the Affordable Care Act, nor of this Court.

Conclusion

Throughout this nation, individuals, nonprofit organizations, and government officials are looking for guidance concerning the implementation of these provisions of the Affordable Care Act. The Tenth Circuit has given them a convoluted ruling that results from conflicting district court decisions, that conflicts with *Ballard*, *Thomas*, and *Hobby Lobby*, and that leaves the consciences of the Little Sisters and others violated and compromised.

To clear up this confusion, Amicus urges this Court to grant the Little Sisters' petition for certiorari.

Respectfully submitted, this the 24th day of August, 2015.

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IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF INTEREST[1]

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[1] Counsel of record for both parties received timely notice of the intent to file this brief. *See* Sup. Ct. R. 37. Counsel for both parties have consented to the filing of this brief, and their consents have been filed with this Court. No counsel for either party authored the brief in whole or in part, and neither party nor their counsel made any monetary contribution intended to fund the brief's preparation or submission.

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SUMMARY OF ARGUMENT

Suppose a federal law required government officials to enter a Catholic church and use church property to distribute contraceptives and abortifacients over church's objection. Such a law would surely burden the church's religion, even if the government paid for the objectionable medications and compensated the church for the use of its resources. By commandeering church property, such a law would force the church to be complicit in activity to which it has serious religious objections.

That is what the government has done in this case. The Little Sisters of the Poor are an order of Catholic nuns who object to being forced to participate in the distribution to their employees of contraceptives and abortifacients.[2] The government insists that regulations of the Department of Health and Human Services (HHS) relieve the nuns of the obligation to pay for these drugs. However, the government still commandeers health care plans created and controlled by the nuns and uses them to distribute contraceptives and abortifacients. State and federal law treat these health care plans as the property of the Little Sisters of the Poor. The nuns thus make the unremarkable claim that the government substantially burdens their religion when it uses their property in ways that they find religiously offensive.

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[2] Petitioners include other religious organizations and their health care plans who are similarly situated to the Little Sisters of the Poor. For convenience and clarity, however, this brief refers only to the Little Sisters of the Poor.

The courts below in this and similar cases, however, have fundamentally misunderstood the nature of the burden created by the Department's regulations. They thus frustrate Congressional policy requiring the government to justify its actions in such cases.

Specifically, the lower court focused on the fact that the Little Sisters of the Poor are not financially liable for contraception and that the paperwork requirements created by the Department's regulations are minimal. No one, however, claims that the nuns are being forced to directly purchase contraception, nor is their religion burdened because they have to fill out additional forms. Such arguments miss the basic issue in this case.

The Department's regulations exercise sweeping authority over religious institutions. Given that many religious believers object to all or some of the drugs included in the contraceptive mandate, dozens of lawsuits challenging those regulations have been filed. Hundreds of other institutions must also object to the Department's regulations. The petition for certiorari should be granted so that this Court can resolve this "important question of federal law."

ARGUMENT

By commandeering the health care plan created, controlled, and owned by Petitioners, the Department's regulations force them to participate in distributing religiously objectionable medications.

I. The Department's regulations burden Petitioners' religion by commandeering their property and using it to distribute contraceptives and abortifacients.

The burden imposed by the Department's regulations can best be understood though analogies. Suppose that there was a law that required the nuns of the Little Sisters of the Poor to distribute contraceptives personally to their employees. The government would pay for the contraceptives and compensate the nuns for their time and expenses, so there would be no financial complicity in the distribution of the medications. Furthermore, the nuns would be free to voice their religious objections while distributing the contraceptives and the government would take steps to insure that anyone receiving contraceptives from the nuns understood their religious objections. Such a law would clearly place a substantial burden on the nuns' religious exercise. Yet it would impose no financial burden on the nuns, and handing out the contraceptives could be done very easily, requiring far less effort than other regulatory requirements with which Petitioners must comply.

Now imagine that the law, rather than requiring that the nuns personally distribute the contraceptives, allowed a government official to enter the nuns' facilities and use their medicine carts and other equipment to distribute contraceptives. Again, the law would fully compensate the Little Sisters of the Poor for their financial costs. Again, the nuns would be free to follow the medicine carts through their facility denouncing contraception and abortion, and the government could take steps to make clear

that the Little Sisters of the Poor object to the provision of contraceptives with the nuns' property. Such a law would represent far more than a "*de minimis*" burden on the nuns' religion. Rather, it would directly burden the nuns' religious exercise in the same way as the first hypothetical law, namely by making them an involuntary party to the distribution of medications to which they have serious and sincere religious objections. The fact that this hypothetical law is directed at the nuns' property rather than at their bodies does not change the fact that they would be forced to be complicit in what they sincerely regard as sinful behavior.

The Department's regulations are analogous to this second law. It is true that the Little Sisters of the Poor have no financial liability for the purchase of contraceptives, but they are not claiming that their religious exercise is burdened because they must purchase contraceptives. Rather, the Little Sisters of the Poor have created a health care plan, a plan that they control and that is their property. The government, in pursuit of its goals, is seeking to use the nuns' plan to distribute contraceptives. For the government to do this constitutes a burden on Petitioners' religion, a burden that the court below failed to grasp or properly consider.

A. State and federal law treat employer-provided health care plans as property of the employers, created and controlled by them.

Health insurance plans do not spring into existence *ex nihilo*, nor are they creations of the government. *Cf. Lockheed Corp. v. Spink*, 517 U.S.

882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."). Rather, they are devices of employers designed to provide employees with certain benefits as part of their compensation. The health care plan of the Little Sisters of the Poor exists only because the Little Sisters of the Poor created it.

As a matter of state law, employer-provided health insurance is a contract between the employer and the insurance provider to which the employee is generally treated as a third-party beneficiary. *See, e.g., Southwest Health Plan, Inc. v. Sparkman*, 921 S.W.2d 355 (Tex. App. 1996) (holding that an employee was a third party beneficiary of a contract between the employer and its health insurance company); *but see Cahill v. Eastern Benefit Systems, Inc.*, 603 N.E.2d 788, 792 (Ill. App. Ct. 1992) (holding that an employee could not sue as a third-party beneficiary of a contract between an employer and the insurance company providing benefits to the employer's employees).

In the case of self-insurance by the employer, the relationship between the employer and the third party administrator (TPA) is also contractual. *See, e.g., Multi-Craft Contractors Inc., v. Perico Ltd.*, 239 S.W.3d 33 (Ark. Ct. App. 2006) (deciding a dispute between a self-insured employer and its third-party administrator as a matter of contract law). Once they are executed, contracts are, of course, a form of personal property. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS Ch. 15 Introductory Note (AM. LAW

INST. 1981) (noting that the law of assignment in contract "is part of the larger subject of transfer of intangible property.").

To be sure, insurance contracts are a very heavily regulated form of property. *See* Timothy S. Jost & Mark A. Hall, *The Role of State Regulation in Consumer Driven Health Care*, 31 AM. J. L. & MED. 395, 399 (2005) ("Health insurance is one of the most heavily regulated industries in the United States."). Petitioners, however, are not challenging the authority of the government to regulate employer-provided health insurance in general.[3] Rather, they are challenging the lawfulness of the way in which the government has chosen to exercise that power in this particular case. The fact that property is generally subject to government regulation does not alter the fundamental fact that it remains the property of its owner.

In other contexts, federal law treats employer-provided health care plans as property of the employer. For example, they may be assumed in bankruptcy and are treated as property of the employer's bankruptcy estate. *See* 11 U.S.C. §365 (2012) (setting forth the trustee in bankruptcy's power to assume executory contracts). Although the Employee Retirement Income Security Act (ERISA), the main federal statute governing employer-

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[3] There are, however, complex questions in this case over the precise nature and scope of the government's power to regulate Petitioners' health care plans under ERISA and the ACA. *See* Petition for Certiorari at 11-13.

provided insurance, does not govern Petitioners' health care plan, this Court's ERISA cases illustrate that health care plans are the creatures of their creators, namely employers. This Court has noted that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright Corporation v. Schoonejongen*, 514 U.S. 73, 78 (1995). This is true even though ERISA imposes on plan administrators fiduciary duties to plan beneficiaries. [4] "ERISA's fiduciary duty requirement simply is not implicated where [an employer], acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Likewise, this Court has said that "decisions regarding the form or structure of a plan are generally settlor [i.e. employer] functions." *Beck v. Pace Int'l Union*, 551 U.S. 96, 101-102 (2007) (internal citations and quotations omitted). In short, federal law treats employer-provided health care plans as the creation and creature of the employer.

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[4] It is worth noting that in ERISA argot, "plan administrators" and "third party administrators" are not the same thing. "Plan administrators" are generally the employers who set up the plans. "Third party administrators," in contrast, are mere agents hired by the plan administrators to process claims and perform other clerical functions on behalf of employers.

B. The regulations use Petitioners' health care plans to distribute contraceptives and abortifacients to which they have religious objections.

There are many ways in which the government could ensure that Petitioners' employees have access to contraception without cost sharing, as required by the Affordable Care Act (ACA). However, as the D.C. Circuit explained, what the Department's regulations seek to do here is make obtaining contraception "seamless from the beneficiaries' perspective." *Priests for Life v. Dept. of Health & Human Serv's*, 772 F.3d 229, 245 (D.C. Cir. 2014). This "seamlessness," however, is achieved only because the government uses the religious objectors' plans to distribute contraceptives. Under the regulations, the TPA, an agent hired by the Little Sisters of the Poor and fireable by them, would process claims of employees to contraception and insure that the religiously offensive medications are distributed through Petitioners' plan. *See* 26 C.F.R. §54.9815-2713AT(b)(2) (2015). The only reason that the TPA has a relationship with Petitioners' employees or access to the information necessary to provide them with contraception is because the TPA administers the Little Sisters of the Poor's health care plan. Thus, contrary to the suggestions of lower courts in similar cases, it is not true that "the acts that violate their faith are the acts of third parties." *See East Texas Baptist University v. Burwell*, 2015 WL 3852811, at *5 (5th Cir. 2015). In this context, the TPA is not some remote stranger, a third-party unconnected with petitioners. Rather the TPA is the nuns' agent, administering the nuns' plan.

The various attempts of the government to accommodate the religious objections of Petitioners' do nothing to eliminate these concerns. True, the government claims to relieve the Little Sisters of the Poor of financial complicity. It is a non sequitur, however, to argue that because there is no financial burden, there is no burden of any kind. *See Thomas v. Review Board*, 450 U.S. 707 (1981) (holding that the government violated the Free Exercise clause when it punished someone for refusing religiously objectionable but paid employment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (same). Likewise, the employees would be notified in various ways that the Little Sisters of the Poor are not paying for contraceptives, *See* 26 C.F.R. §54.9815-2713A(d) (2015) ("The notice [from the TPA to employees] must specify that the eligible organization does not administer or fund contraceptive benefits"), but this does not change the fact that it is the nuns' plan that is being used to purvey contraceptives to which they object. It is this use of their property that constitutes a burden on Petitioners' religion.

II. The Court should grant certiorari because the lower courts have misunderstood the nature of the burden created by the Department's regulations.

By misunderstanding the nature of the burden on religion created by the Department's regulations, the lower courts threaten to deprive potentially hundreds of religious organizations of the protection afforded to them by Congress in the Religious Freedom Restoration Act (RFRA). Certiorari is thus warranted in this case because there is an "an

important question of federal law that... should be settled by this Court." Sup. Ct. R. 10(c).

A. The lower courts mistakenly conceptualized the burden.

The Tenth Circuit in this case misunderstood the burden placed on the religious exercise of the Little Sisters of the Poor by the Department's regulations. Its analysis focused on two issues. The first was the fact that if the Little Sisters of the Poor were to invoke the Department's regulations, the government would assume the financial costs of providing contraception to their employees. *See* Pet. App. 48a. ("The accommodation relieves the Plaintiffs from complying with the Mandate and guarantees that they will not have to ... pay for ... contraceptive coverage.").

The second was that filling out the paperwork required by the Department's regulations imposed only a *de minimis* administrative burden. *Id.* at 48a ("[T]hese *de minimis* administrative tasks do not substantially burden religious exercise for purposes of RFRA"). Other lower courts faced with similar challenges to the Departments regulations have characterized the burdens imposed on religious objectors in similar terms. *See, e.g., Priests for Life*, 772 F.3d at 249 ("A review of the regulatory accommodation shows that the opt-out mechanism imposes a *de minimis* requirement on any eligible organization"). This approach, however, is misconceived.

1. It is irrelevant that Petitioners are not financially liable.

First, the fact that the government shoulders the financial costs of providing contraception to Petitioners' employees is both unexceptional and irrelevant. The Office of Management and Budget estimates that in 2015 the federal government will spend $1.1 trillion on the health care of American citizens. Office of Management & Budget, *Table 15.1 – Total Outlays for Health Programs: 1962-2020* available at: https://www.whitehouse.gov/omb/budget/Historicals/.

These subsidies take the form of everything from financial support for basic medical research to paying directly for the medical procedures of millions of citizens. Through the Department's regulations, the government has opted to spend part of its health care budget on contraception. There is nothing unusual about this. It is also irrelevant to this case.

One obviously cannot claim that one's religious freedom is burdened when others behave in ways that one finds religiously objectionable. As this Court observed in *Bowen v. Roy*, for example, religious freedom "simply cannot be understood to require that the Government conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Contrary to the suggestion by the lower court, however, challengers to the Department's regulations do not question this principle. *See* Pet. App. 91a

("Plaintiffs sincerely oppose contraception, but their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA."); *Priests for Life*, 772 F.3d at 246 ("They have no RFRA right to be free from the unease, or even anguish, of knowing that third parties are legally privileged or obligated to act in ways their religion abhors."). The Little Sisters of the Poor are not claiming that their religion is burdened because the government pays for contraception to which they object. Nor are they claiming that their religion is burdened because their employees might use medications at government expense that the nuns believe to be sinful. In short, they are not trying to keep the government from providing contraception to their employees, nor are they seeking to limit their employees' ability to obtain or use contraception at no expense.

As long-time observers of this kind of litigation, we suspect that both the government and the lower courts feel exasperated that having been relieved of the obligation to purchase contraceptives, the Little Sisters of the Poor and other objectors have the temerity to challenge the Department's regulations.[5]

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[5] Writing for the Seventh Circuit, for example, Judge Posner rather shockingly suggested that the plaintiff, a Christian liberal arts college, was lying when it claimed that it would have no RFRA objection to the Department's regulations if the College's health care plan was not used to distribute abortifacients. *See Wheaton College v. Burwell*, 2015 WL 3988356, *6 ("At oral argument Wheaton's lawyer said that his client has no objection to the government's using the college's insurers to provide emergency-contraceptive coverage as long as

(cont'd)

Such impatience, however, is neither warranted nor a sound basis for legal analysis. The fact that the government has avoided violating RFRA by forcing the Little Sisters of the Poor to pay for contraceptives does not leave HHS free to violate RFRA by commandeering the nuns' health care plans. *See Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751, 2775 (2014) ("By requiring [religious objectors] ... to *arrange* for such coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs" (emphasis added)).

2. It is irrelevant that the paperwork required is "de minimis."

The Tenth Circuit and other lower courts have also emphasized that the Department's regulations require only that objectors fill out a simple form. *See* Pet. App. 48a ("[T]hese *de minimis* administrative tasks do not substantially burden religious exercise for purposes of RFRA"). Doing so would take at most a few minutes and is far less onerous than other regulations with which the Little Sisters of the Poor must comply. *Compare Priests for Life*, 772 F.3d at

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(cont'd from previous page)
it's not 'using' Wheaton's contract with the insurers .... We wonder."). Elsewhere, in the opinion Judge Posner suggested that the plaintiff's real goal was to make it more difficult for students to obtain abortifacients. *See id.* at *5 ("But it seeks to make that access more difficult"). These asides were irrelevant to the legal questions Judge Posner was addressing, but they do reveal an unfortunate unwillingness to consider the nature of the religious burdens created by the Department's regulations. It also speaks to the need for this Court to grant certiorari in order to analyze these nationally important issues.

237 ("All Plaintiffs must do to opt out is to express what they believe and seek what they want via a letter or two-page form. That bit of paperwork is more straightforward and minimal than many that are staples of nonprofit organizations' compliance with law in the modern administrative state."). This argument also misunderstands the nature of the religious burden in this case. What is objectionable about the Department's regulations is not that they require religious institutions to fill out additional paperwork. Rather, those regulations create a burden by forcing religious institutions to participate in the delivery of medications to which they have sincere and grievous religious objections by commandeering their property.

B. Widespread religious objections to the regulations make a grant of certiorari proper.

The nuns claim that through forced complicity in the delivery of contraceptives and abortifacients, the government will "substantially burden [their] religious exercises." *See* 42 U.S.C. §2000bb-1(a) (2012). They are not alone in this belief. The Department chose only to exempt "churches" from the ACA's contraceptive mandate, but hundreds of organizations that fail to qualify as "churches" nevertheless have grave religious objections to forced complicity in the delivery of contraception or abortifacients.

To give a single example, the Catholic Church has well-articulated and long-standing religious objections to both contraception and abortifacients. *See* JOHN PAUL II, *EVANGELIUM VITAE* (1995)

(articulating the Catholic Church's opposition to abortion); PAUL VII, *HUMANAE VITAE* (1968) (articulating the Catholic Church's opposition to artificial birth control). It is reasonable to suppose that some Catholic organizations will challenge any law that requires that they be complicit in providing such drugs. There are hundreds of Catholic religious orders, primary and secondary schools, colleges and universities, and social service organizations in the United States. *See generally* THE OFFICIAL CATHOLIC DIRECTORY ANNO DOMINI 2015 (2015). Perhaps the most compelling evidence that the Little Sisters of the Poor raise "an important question of federal law that... should be settled by this Court," Sup. Ct. R. 10(c), is that the Department's regulations have been repeatedly challenged in the lower courts by both Catholic organizations and non-Catholic organizations. *See* Becket Fund for Religious Liberty, *HHS Information Central*, http://www.becketfund.org/hhsinformationcentral/ (tracking all of the litigation challenging the contraception mandate).

Unless this Court grants the Little Sisters of the Poor's petition for a writ of certiorari, their ability and the ability of those similarly situated to challenge the Department's regulations will be at an end. This is true, even though the court below failed to understand the nature of the burden created by those regulations and despite the fact that the government has not been required to explain why it is necessary to threaten these nuns with millions of dollars in fines to achieve its objectives or even precisely what its objectives in crafting this particular regulatory mechanism might be. Several

other circuit courts have also blessed the Department's regulations. *See Wheaton College v. Burwell*, 2015 WL 3988356 (7th Cir. July 1, 2015), *East Texas Baptist v. Burwell*, 2015 WL 3852811 (5th Cir. June 22, 2015, *Geneva College v. Health & Human Services Secretary*, 778 F.3d 422 (3d Cir. 2015), *Priests for Life v. Department of Health & Human Services*, 772 F.3d 229 (D.C. Cir. 2014). Unless this Court grants certiorari, it will be impossible for religious institutions in much of the country to have their religious objections properly considered, despite the clear Congressional mandate that courts weigh the interest in government regulation against the burdens those regulations impose on sincere religious beliefs.

CONCLUSION

For these reasons, *amici* respectfully believe that this case warrants a grant of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR INDEPENDENT WOMEN'S FORUM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Independent Women's Forum ("IWF") is a non-partisan, 501(c)(3) research and educational institution. IWF seeks the advancement of women in today's marketplace and the full flourishing of human dignity through freedom and choice. IWF believes that gender equality and access to health care, including preventive services like contraception, are compelling government interests. IWF is concerned, however, that the contraception mandate may disadvantage women by adversely affecting health and employment options and impinging on religious liberty.

As this Court held in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), more is at stake than contraception. This case, too, is about the principles of liberty that animate our Constitution. It is about empowering women to choose the healthcare and salary options that best fit their needs. And it is about empowering charitable employers, many of them women, to follow their deeply held religious conviction that life begins at conception—regardless of the form of charitable entity. IWF believes in this Court's decision in *Hobby Lobby*: That businesswomen—whether they operate for-profit or non-profit ventures—do not check their religious liberty rights at the office door.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Independent Women's Forum states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of *amicus curiae*'s intent to file this brief. Petitioner and Respondent have filed blanket consent requests in this case with the Clerk of the Court.

In short, the deeply personal choices about when life begins and whether or not to use birth control are decisions for women and their families, not the Government. IWF therefore urges this Court to grant this petition and to decide whether the HHS "accommodation" discriminates among religious organizations in violation of the First Amendment.

SUMMARY OF THE ARGUMENT

HHS has overstepped its bounds in making the unprecedented decision to discriminate among religious employers, subjecting some to the contraceptive mandate and exempting others. By making "explicit and deliberate distinctions between different religious organizations" without good cause, *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), HHS is interfering with the right of non-profit businesswomen to run their businesses according to their conscience—and all because of the determination that such non-profits are not sufficiently "religious." That is a judgment the Constitution does not allow.

Such blatant discrimination not only runs afoul of Congress's directive that all religious institutions are worthy of accommodation, Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. §§ 2000bb *et seq.*, it also violates the First Amendment's religion clauses. The First Amendment prevents the Government from meddling in the internal affairs of religious associations.

What is more, HHS's discriminatory dictate comes from an agency that has neither the authority nor the expertise to decide whether nuns—or any other religious employer—are sufficiently "religious." Such a determination would be highly suspect were it to come from Congress, *see Hosanna-Tabor Evangelical*

Lutheran Church & Sch. v. EEOC, 132 S.Ct. 694, 706 (2012); it is unquestionably so where it comes from an agency with no religious expertise.

Congress does not "hide elephants in mouseholes." *Whitman v. American Trucking*, 531 U.S. 457, 468 (2001). Courts, not agencies, have the primary role in interpreting statutes that raise questions of "deep economic and political significance." *King v. Burwell*, 135 S.Ct. 2480, 2489 (2015). Here, there is no legislative delegation—much less a sufficiently specific one—to HHS, HRSA, the IRS, or any other agency of the authority to discriminate among religious groups by deciding which of them is sufficiently religious. Unsurprisingly, the ACA has *nothing* to say about religion: Congress assumed that the "very broad protections" of RFRA would apply. *See Hobby Lobby*, 134 S.Ct. at 2760. Instead, administrative bureaucrats took it upon themselves to determine the sorts of religious persons and organizations that are entitled to exercise conscience rights. But on an issue of such social and indeed constitutional significance, Congress must delegate, and it must do so expressly.

This Court should grant certiorari on the questions presented and hold that the First Amendment prohibits an agency from discriminating against certain religious organizations.

ARGUMENT

I. The Key Insight Of *Hobby Lobby*—That Business Owners And Operators Do Not Give Up Their Conscience Rights Regardless Of The Legal Form They Take—Controls This Case.

The core holding of *Hobby Lobby* controls this case. In *Hobby Lobby*, this Court held that business people do not check their religious liberty rights at the office door, even if they operate for-profit ventures. It follows directly from this principle that the entity structure of a *non-profit* organization should not defeat the ability of that organization's leadership to exercise rights of conscience.

Under the rules promulgated by HRSA, the Little Sisters of the Poor would be exempt from the contraceptive mandate had they organized their ministry under the authority of the Catholic Bishop. And while they could have chosen to do so, the Sisters determined that the best way to provide for the elderly poor was to fund, operate, and control the ministry themselves. According to the Government, the Sisters' conscience rights turn on the organizational form of their ministry. On the basis of their ministry form, the Government seeks to force the Sisters to violate the convictions of their faith, or alternatively, to fine them millions of dollars a year. *Cf. Hobby Lobby*, 134 S.Ct. at 2767 ("HHS would put these merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits, available to their competitors, of operating as corporations.").

But First Amendment liberties do not depend on so flimsy a distinction. The First Amendment requires

that all religious groups be treated equally, regardless of their internal organizational structure. *See Hosanna-Tabor*, 132 S.Ct. at 706.

Indeed, this Court has already rejected the sort of argument made by the Government here. In *Hobby Lobby*, HHS argued that when "merchants cho[o]se to incorporate their businesses—without in any way changing the size or nature of their businesses—they ... forfeit all RFRA (and free-exercise) rights." 134 S.Ct. at 2767.[2] This Court rejected that claim out of hand. The contraceptive mandate was "unlawful," the Court held, precisely because owners of companies do not forfeit their religious liberty rights "when they decide[] to organize their businesses as corporations rather than sole proprietorships or general partnerships." *Id.* at 2759. Conscience rights do not depend on organizational form. Rather, "[t]he plain terms of RFRA make it perfectly clear that Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs." *Id.* So too here. How best to operate a ministry is a decision best left to those ministering.

Respecting the rights of individuals to structure their business or ministry as they see fit not only best

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[2] "In order to ensure broad protection for religious liberty, RFRA provides that 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.'" *Hobby Lobby*, 134 S.Ct. at 2761 (quoting § 2000bb–1(a)). "If the Government substantially burdens a person's exercise of religion, under the Act that person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 2761 (quoting § 2000bb–1(b)).

accords with the First Amendment and federal law, it encourages the entrepreneurship and innovation our federalist system was meant to protect. "It is one of the happy incidents of the federal system," Justice Louis D. Brandeis observed in 1932, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). One can make a powerful case for decentralized authority envisioned by Justice Brandeis.

The same benefits accrue when individuals, businesses and ministries are left free to structure their enterprises according to their own ideas and deepest convictions. As Justice Brandeis put it, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation." *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). Certainly our nation would be worse off without the Little Sisters.

All this to say, furthering the religious freedom of charities and non-profits also "furthers individual religious freedom." *Hobby Lobby*, 134 S.Ct. at 2769. Just as "[p]rotecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being," protecting religious charities protects the religious liberty of the individuals who own and operate those companies. *Id.* at 2768.

Indeed, the contraception mandate overlooks the fact that women and their families benefit from a flexible work environment that allows them the option of their preferences. Women may choose to prioritize a

higher salary, or the ability to work from home, over more generous contraceptive coverage. Older women, in particular, may prioritize other health benefits, like cancer coverage. As this case aptly demonstrates, women of faith may prefer to work for a faith-based organization that refuses to facilitate practices with which they have a profound moral disagreement.

This Court has already held that the "Corporate Form" is no grounds on which to deny religious freedom. Neither is the internal business structure taken by a religious non-profit like the Little Sisters. This Court should grant certiorari and reverse the decision below.

II. HHS's Religious Exemption Violates Fundamental Principles of First Amendment and Administrative Law.

HHS's religious exemption violates fundamental principles of First Amendment and administrative law. To begin, Congress in no way, shape, or form delegated to HHS the authority to regulate religion—much less make untenable distinctions among religious groups. Indeed, there was no need for Congress to delegate a religious exemption power because Congress had already exempted all religious employers through the broad protections of the Religious Freedom and Restoration Act. Second, even if HHS had authority to regulate religion, the Constitution does not permit an agency to treat one religious group different from another based solely on religious organizational form.

A. The double delegation

The ACA requires an employer's group health plan or group-health-insurance coverage to furnish "preventive care and screenings" for women without

"any cost sharing requirements." 42 U.S.C. § 300gg–13(a)(4). But Congress did not define "preventive care and screenings." Instead, Congress authorized the Health Resources and Services Administration (HRSA), a component of HHS, to determine what types of care must be covered. *Id.* That authorization is quite narrow: Covered plans must provide preventive care and screening for women "as provided for in comprehensive guidelines *supported by the Health Resources and Services Administration for purposes of this paragraph*." *Id.* (emphasis added). Congress thus required HHS only to determine the scope of women's "preventive care and screenings" covered by the ACA. That authorization, as it is, says nothing about religious accommodation and cannot possibly be read to delegate to HHS the authority to say who is or is not sufficiently religious.

But HHS took matters into its own hands. With no authorization from Congress, HHS issued regulations purporting to empower its subsidiary agency, HRSA, to establish exemptions from the contraceptive mandate for "religious employers." 45 CFR § 147.131(a). This so-called delegation simply authorizes HRSA to "establish an exemption" from the contraceptive mandate for "religious employer[s]." 45 CFR § 147.131(a). That "delegation" is itself limited: it authorizes a religious-liberty exemption but says nothing about discriminating among religious employers.

In exercising authority under this double delegation, HRSA exempted churches and their "integrated auxiliaries" from the contraceptive mandate while demanding compliance—at pain of millions of dollars in fines—by religious non-profit ministries, religious hospitals, and religious universities. *See* 78 Fed. Reg. at 39,874 (citing 26 U.S.C. §§ 6033(a)(3)(A)(i), (iii)).

The only reason given by HRSA for this distinction was the agency's guess as to how closely religious nonprofits might follow established church doctrine: the Government opined that churches and integrated auxiliaries "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

Such guesswork cannot be the basis on which to deny First Amendment rights. And Congress cannot be presumed to have authorized it without a statement saying so. This Court has been clear that Congress is not presumed to delegate authority over major social and political questions, to say nothing of questions implicating constitutional rights, without at least saying *something*. Here, the ACA is entirely silent on the issue. And no wonder: Had Congress sought to distinguish between religious groups based solely on their organizational form, the First Amendment would prevent such discrimination.

B. HHS' religious exemption violates administrative law principles.

The administrative state "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Administrative agencies now exercise substantial authority over our nation's "economic, social, and political activities." *City of Arlington, Tex. v. F.C.C.*, 133 S.Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting). And the federal bureaucracy only continues to grow. *Id.* Indeed, the Patient Protection and Affordable Care Act itself

authorizes dozens of new entities. *Id.* (citing Congressional Research Service, C. Copeland, New Entities Created Pursuant to the Patient Protection and Affordable Care Act 1 (2010)). The current administrative state gives rise to Separation of Powers concerns. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S.Ct. 1225, 1244 (2015) (Thomas, J., concurring).

Within this Court's province and duty to say what the law is, *Marbury v. Madison*, 5 U.S. 137, 177 (1803), resides the responsibility to provide a check on the vast apparatus we know as the administrative state. *See Sackett v. EPA*, 132 S.Ct. 1367, 1374 (2012) (rejecting EPA's attempt to "strong arm" "regulated parties into 'voluntary compliance' without the opportunity for judicial review"). As an unaccountable "Fourth Branch," certain restrictions inhere. Principally, an agency "cannot exercise" regulatory or interpretive authority "until it has it." *City of Arlington*, 133 S.Ct. at 1877 (Roberts, C.J., dissenting).

Indeed, the whole idea of *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 135 S.Ct. at 2488 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). "In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.*

As the Chief Justice put it in *King*: "This is one of those cases." *Id.* Even more than questions involving tax credits, issues of moral conscience, religious governance, and the difficult question of when life begins, are of deep "economic and political significance." *Id.* It would be a "drastic step" to assume that Congress intended for an agency to make the call as to

whether a nonprofit religious ministry is sufficiently religious to merit protection under the law. *See Burwell v. Hobby Lobby*, Oral Argument Transcript, 134 S.Ct. 2751 (March 25, 2014) (Nos. 13-354, 13-356) ("Now, what—what kind of constitutional structure do we have if the Congress can give an agency the power to grant or not grant a religious exemption based on what the agency determined? I recognize delegation of powers rules are somewhat moribund insofar as their enforcement in this Court. But when we have a First Amendment issue of this consequence, shouldn't we indicate that it's for the Congress, not the agency, to determine that this corporation gets the exemption on that one, and not even for RFRA purposes, for other purposes?"). Indeed, "one might claim" a "background canon of interpretation" to the effect that decisions with enormous social consequences "should be made by democratically elected Members of Congress rather than by unelected agency administrators." *FDA v. Brown & Williamson*, 529 U.S. 120, 190 (2000) (Breyer, J., dissenting).

At a minimum, had Congress wished to assign the task of determining religious sufficiency to an agency, "it surely would have done so expressly." *City of Arlington*, 133 S.Ct. at 1881 (Roberts, C. J., dissenting) (citation omitted). Nowhere in the 900-and-some page ACA is there any reference to any agency determining whether a religious ministry is sufficiently religious to merit protection—much less a Congressional delegation involving the "specific provision" and "particular question" at issue here. *Id.* Indeed, the Government cannot point to any "legislative delegation to [HHS or HRSA] on a particular question [involving religiosity]." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (emphasis in original). That is why HHS

had to come up with its own delegation. But the Constitution does not permit an agency to delegate to itself.

That Congress did not choose to delegate authority over questions of religious sufficiency is not surprising. Congress believed that it had already spoken to the issue. The Religious Freedom Restoration Act was passed by a bipartisan Congress and signed into law by President Clinton. This uncontroversial statute (at least at the time) provided expansive religious liberty rights to all—not just those groups that an unaccountable agency deemed worthy. Given this statutory backdrop, HHS' power grab is untenable. Even if the ACA could somehow be interpreted to grant authority to HHS over religion (it cannot), where Congress has exempted particular provisions from that interpretive authority, that exemption must be respected. *Id.* RFRA is just such an exemption.

This Court's cases foreclose the arguments HHS has attempted here. Consider *FDA v. Brown & Williamson*, 529 U.S. 120 (2000). The question in that case was whether FDA had authority to regulate tobacco and tobacco products. The relevant statutory language defined drug to include "articles (other than food) intended to affect the structure or any function of the body." 21 U.S.C. § 321(g)(1)(C) (1994). Under that language, the FDA concluded that it could regulate tobacco. This Court disagreed, however. Congress had passed other statutes that clearly regulated tobacco—such legislation should "preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products." 529 U.S. at 155. Moreover, the conclusion that the FDA had no authority over tobacco was influenced "by the nature

of the question presented." *Id.* at 159. In "extraordinary cases," the Court observed, courts should "hesitate" before concluding that Congress intended an implicit delegation. *Id.* The Court relied on then-Judge Breyer's 1986 essay, for the proposition that, when considering agency authority, it is appropriate for the court to "ask whether the legal question is an important one." *Id.* (quoting Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)). There is a difference, Judge Breyer had written, between "major questions," on which "Congress is more likely to have focused," and "interstitial matters." *Id.* With regards to the regulation of tobacco, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

In short, the ACA must be read against Congress' long history of granting religious accommodation to *all* religious groups. In light of that history, Congress cannot be presumed to delegate to an agency questions regarding religious intensity. And even if such a delegation could be presumed, the ACA is silent in critical respects. Instead of identifying the "specific provision" that delegates specific authority to the agency, *City of Arlington*, 133 S.Ct. at 1881—the statute is entirely silent as to religion.

Were this not enough, this case involves issues of unquestionable significance: "difficult and important question[s] of religion and moral philosophy." *Hobby Lobby*, 134 S.Ct. at 2778. As in *Brown and Williamson*, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id. See also MCI v.*

AT&T, 512 U.S. 218, 231 (1994) (Congress does not usually delegate "enormous" questions).

Finally, even were such an enormous delegation conceivable, HHS would not be the agency of choice. While HHS may have expertise in the area of women's health, it has no expertise in the field of religious intensity. "It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting [religious exemptions] of this sort." *King v. Burwell* (*citing Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006); *see also Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (related expertise of agency relevant to authority).

Moreover, Congress could not delegate authority to an agency on this question even if it wanted to. The First Amendment prohibits government from making "explicit and deliberate distinctions between different religious organizations" without good reason. *See* Petr's Br. at 34 (quoting *Larson v. Valente*, 456 U.S. 228, 247 n.23 (1982), and citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *Fowler v. Rhode Island*, 345 U.S. 67, 69- 70 (1953)). HHS admits that it has made just such deliberate distinctions in exempting houses of worship and "integrated auxiliaries" from the contraceptive mandate while demanding that the Little Sisters and other religious nonprofits comply. Since the HHS rule turns merely on the organizational form of the religious entity, a nonprofit religious ministry may be penalized under the regulations even as it engages *in precisely the same religious exercise* as exempted "integrated auxiliary."

HHS argues that its discrimination is justified. Certain forms of church hierarchy, HHS speculates,

like integrated auxiliaries, "are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874. But there is no reason to think that the employees of nuns who compose the Little Sisters are any more likely to disobey church teachings than employees of the Catholic church proper. Indeed, these employees have deliberately come to work for the Little Sisters and their ministry, which is dedicated to serving the church and its teachings, not least by living out the biblical command to care for the poor. *See, e.g.*, *Matthew* 19:21 ("Jesus answered, If you want to be perfect, go, sell your possessions and give to the poor, and you will have treasure in heaven. Then come, follow me."); *Luke* 14:13 ("But when you give a banquet, invite the poor, the crippled, the lame, the blind."); *Luke* 18:22 ("When Jesus heard this, he said to him, You still lack one thing. Sell everything you have and give to the poor, and you will have treasure in heaven. Then come, follow me."). These facts expose HHS' determinations for what they are: pure guesswork unauthorized by law.

Finally, "intensity of ... belief" is a dangerous ground on which to regulate. *Christian Univ. v. Weaver*, 534 F.3d 1245, 1249 (10th Cir. 2008) (McConnell, J.). It involves courts in the messy business of examining and ranking religious institutions. This is the very definition of entanglement. Faith understandably motivates believers to participate in broader religious ministries and outreach. *Id.* at 1249. People of faith do not always (nor even often) practice their faith "in that compartmentalized way." *Korte v. Sebelius*, 735 F.3d 654, 681 (10th Cir. 2013). That such ministries

often serve real people with real needs does not make those ministries any less religious. Nor, again, does it mean that participants are any less likely to agree with church doctrine.

C. HHS' religious exemption is invalid because it creates significant First Amendment concerns.

Even if it was constitutionally permissible for Congress to make deliberate distinctions based on the form of church entity (which it is not), HRSA may not do so. As an agency, it may not construe an ambiguous statute so as to raise serious constitutional doubts. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001).

At the outset, there is no real dispute about the serious constitutional problems created by HRSA' discriminatory religious liberty exemption. As the Government recently put it, "allow[ing] houses of worship [an exemption], but deny[ing] equal privileges to other, independent [religious] organizations that also have sincerely held religious tenets" would "*create a serious Establishment Clause problem.*" Gov't Amicus Br. at 11, *Spencer v. World Vision*, 633 F.3d 723 (9th Cir. 2008) (No. 08- 35532) (emphasis added).

The interpretive consequences are equally clear: "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172 (citing *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). This requirement stems from a two-fold concern: First, the Court's "prudential desire not to needlessly reach constitu-

tional issues." *Id.* at 172. Second, the court's "assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73.[3]

Ironically, HHS specifically provided that the religious exemption was not limited to any "particular form of entity under state law." 78 Fed. Reg. at 39,874. ("The Departments also proposed to clarify that, for purposes of the religious employer exemption, an employer that is organized and operates as a nonprofit entity is not limited to any particular form of entity under state law."). Despite this implicit acknowledgement that the *state legal* form of a ministry should not control the First Amendment analysis, HRSA proposed to make distinctions based upon *internal religious organization*. If anything, the latter should receive more deference under the First Amendment.

HHS is not Congress. It is an agency that derives its authority from congressional delegation and cannot expand the scope of its own jurisdiction via regulatory fiat. Moreover, even the scope of that purported delegation does not allow HRSA to discriminate among religious believers. The provision simply authorizes HRSA to determine the scope of women's preventive care. It says nothing about religion. And this is as one would expect—Congress does not ordinarily leave such "enormous" questions to a regulatory agency. *MCI*, 512 U.S. at 231.

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[3] In a similar way, agencies may not interpret ambiguous statutes to apply extraterritorially. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). Nor may an agency interpret ambiguous statutes to apply retroactively. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

This discrimination among religious groups is especially troublesome given that the contraceptive mandate "presently does not apply to tens of millions of people." *Hobby Lobby*, 134 S.Ct. at 2764 (citation omitted). The employees of Pepsi Bottling and Exxon are exempt from the contraceptive mandate. Yet the Little Sisters and those like them must violate firmly held religious beliefs—or pay punitive fines simply because of the way they chose to organize their ministry. This the Constitution does not permit.

CONCLUSION

For these reasons, *amicus curiae* respectfully requests that this Court grant certiorari.

Respectfully submitted,

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No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLO., ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE ORTHODOX JEWISH RABBIS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

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These amici maintain that while the Tenth Circuit's interpretation of the Religious Freedom Restoration Act ("RFRA") risks curtailing every American's religious liberty, it poses a heightened risk to practitioners of minority religions such as Orthodox Judaism. They are concerned with protecting the religious

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[1] Pursuant to SUP. CT. R. 37.2(a), amici certify that counsel of record received timely notice of the intent to file this brief and granted consent. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party has authored this brief in whole or in part, no party or party's counsel has made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel has made such a monetary contribution.

liberty of their congregants as well as religious adherents nationwide.

SUMMARY OF ARGUMENT

The Tenth Circuit's opinion below dramatically narrowed religious liberty protections—particularly for minority religious adherents such as Orthodox Jews. The court effectively negated this Court's *Hobby Lobby* decision by asking whether the plaintiffs properly understood their own sincerely held religious beliefs—a "question that the federal courts have no business addressing . . . ." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

The court refused to protect the Little Sisters' religious liberty, because it found their explanations regarding the nature and significance of their religious beliefs "unconvincing." *Little Sisters of the Poor Home for the Aged, Denver, Colo., v. Burwell*, 2015 WL 4232096, at *29 (10th Cir. July 14, 2015). If this rule is allowed to stand, religious minorities whose religious practices are not widely known or understood will be the most negatively affected. This Court should grant certiorari and reverse the Tenth Circuit's decision in order to ensure that RFRA continues to protect all sincerely held religious beliefs, including those of religious minorities.

RFRA was intended to "provide very broad protection for religious liberty," *Hobby Lobby*, 134 S. Ct. 2751 at 2760, and to apply in "all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb. The statute prohibits the government from substantially burdening a religious adherent's religious exercise unless doing so is necessary to further

a compelling government interest. 42 U.S.C. § 2000bb-1.

RFRA neither requires nor allows courts to second-guess religious adherents' sincerely held religious beliefs. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. 2751 at 2777–79 ("it is not for us to say that their religious beliefs are mistaken or insubstantial"). A court's role in determining whether a law substantially burdens religious exercise is limited to determining whether the consequences a religious adherent faces for violating the law are significant. *Id.* at 2779. In evaluating and ultimately rejecting the petitioners' claim that complying with the Health and Human Services Accommodation would substantially burden their religious exercise, the Tenth Circuit deviated from this precedent and significantly narrowed RFRA's protection.

There are compelling reasons to grant certiorari and authoritatively resolve the issues presented by this case that are of particular importance to amici as leaders in the Orthodox Jewish community. Orthodox Jews are a minority within a minority in America. Many Americans, including judges, are not familiar with their religious practices. For Orthodox Jews, writing, cooking, traveling a great distance, or using electricity on the Sabbath; creating hybrid plants or animals; wearing a garment made from both wool and linen; shaving with a razor; or cutting one's sideburns too short can constitute sinful behavior.

A rule requiring public-school students or prisoners to wear uniforms containing a wool-linen blend would substantially burden an Orthodox Jew's religious exercise. Under the Tenth Circuit's approach, a judge unacquainted with Orthodox Jewish practice

might wrongly conclude that requiring a religious individual to wear a particular shirt only imposes a slight burden on religious exercise and deny a RFRA accommodation. Such an outcome would be inconsistent with RFRA's plain text, this Court's precedent, and Congress's intent to protect religious minorities.

The Tenth Circuit maintained that, rather than second-guessing the petitioners' sincerely held religious beliefs, it was rejecting their understanding of the interaction between those beliefs and the Accommodation. *Little Sisters*, 2015 WL 4232096, at *19. This is a distinction without a difference.

The court concluded that, when properly understood, the Accommodation did not substantially burden the plaintiffs' religious beliefs. In order to reach that conclusion, the court necessarily made determinations regarding both the Accommodation and the petitioners' religious beliefs. Without reaching conclusions regarding both items, a court could not possibly determine how substantially they interacted with one another.

The allegedly limited nature of the requirements imposed by the Health and Human Services Accommodation may help the government carry its burden of proving that the law is necessary to further a compelling government interest, 42 U.S.C. § 2000bb-1(b), but it should not allow the Accommodation to avoid scrutiny entirely.

ARGUMENT

I. As a Minority Within a Minority, Orthodox Jews Will Experience Deprivations of Their Religious Liberty If Judges Are Empowered To Second-Guess Their Sincerely Held Religious Beliefs.

Approximately 6.7 million Jewish people live in the United States. Luis Lugo et al., *A Portrait of Jewish Americans: Findings from a Pew Research Center Survey of U.S. Jews* at 25 (Oct. 1, 2013), *available at* goo.gl/eQlgU9 (last visited August 18, 2015). Only ten percent of those 6.7 million, or around 670,000, belong to the Orthodox denomination. *Id.* at 10.

Orthodox Jews adhere to religious stringencies that are unfamiliar to most Americans, including many Jews belonging to other denominations, and such practices might appear trivial or insubstantial to a religious outsider. Those seemingly inconsequential practices play an essential role in the religious life and identity of Orthodox Jews.

It is understandable and predictable that judges would lack expertise regarding Orthodox Jews' religious obligations. During a recent oral argument, a judge on the Fifth Circuit chose turning "on a light switch every day" as a prime example of an activity that was unlikely to constitute a substantial burden on someone's religious exercise. Oral Argument at 1:00:00, *East Texas Baptist Univ. v. Burwell*, 2015 WL 3852811 (5th Cir. Apr. 7, 2015), *available at* goo.gl/L50Gt1. To an Orthodox Jew, turning on a light bulb on the Sabbath could constitute a violation of a biblical prohibition found in Exodus 35:3.

That a judge, in attempting to find an activity that no one would find religiously objectionable, inadvertently selected an activity which could constitute a grave sin for an Orthodox Jew, exemplifies how ill-equipped judges are to adjudicate questions of religious belief. This highlights the harm likely to befall Orthodox Jews and other practitioners of minority religions if judges are tasked with undertaking such inquiries.

Many similar examples, in which judges would be poorly positioned to weigh the importance of an Orthodox Jewish practice, could arise. Orthodox Jews consider wearing a garment made from both wool and linen a serious biblical violation. To avoid transgressing this prohibition, Orthodox Jews check labels and sometimes send clothes to specialists who can determine if even a small amount of both materials is present. *E.g.*, *Shatnez-Free Clothing*, CHABAD.ORG, goo.gl/RZRcSm (last visited Aug. 13, 2015). A rule requiring Orthodox Jewish public-school students or prisoners to wear clothing containing a tiny amount of wool and linen may seem innocuous, but it would substantially burden their religious exercise.

Orthodox Jews also observe strict requirements regarding shaving. They believe that it is forbidden to shave one's face with a razor blade or to trim one's side-burns shorter than a certain length. *See* Leviticus 19:27. The Jewish philosopher Maimonides explained that these prohibitions are related to avoiding idolatrous practices. *E.g.*, Eli Touger, *The Prohibition Against Shaving the Edges of One's Head*, CHABAD.ORG, *available at* goo.gl/N2Te11 (last visited Aug. 16, 2015). Orthodox Jews have sought and received

exemptions from rules relating to shaving. *E.g.*, *Litzman v. NYPD*, 2013 WL 6049066 (S.D.N.Y. Nov. 15, 2013) (exempting Orthodox Jewish police officer from the New York Police Department's shaving policy).

Numerous everyday activities such as writing, cooking, or driving a car constitute a desecration of the Sabbath according to Orthodox Jewish practice. In fact, picking flowers, removing bones from fish, and gathering sticks in an open field may each qualify as a violation of the fourth of the Ten Commandments. In biblical times, such a violation merited the death penalty. Numbers 15:32–36. It is unreasonable to ask judges who are unlikely to share, or even be aware of, these beliefs to weigh the substantiality of the burdens placed upon sincere religious believers.

Orthodox Jews have historically felt at home in America, because its robust protections for religious liberty have never discriminated against minority practices. The Tenth Circuit's ruling is incompatible with that admirable history, risks limiting the guarantee of religious liberty only to the most well-known and well-accepted religious practices, and risks making America a less tolerant and less welcoming nation.

II. This Court Should Grant Certiorari To Reaffirm Its Prior Holdings and Clarify That Determining Whether a Law Places a Substantial Burden on Religious Exercise Does Not Require Judges To Question Religious Practitioners' Sincerely Held Beliefs.

A. The Religious Freedom Restoration Act Protects All Religious Exercise, No Matter How Obscure.

The Religious Freedom Restoration Act (RFRA) was intended to "provide very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2760. This understanding is consistent with the text of the statute as well as Supreme Court precedent. *See, e.g., id.*

The statute's "declaration of purposes" expresses Congress's desire that "governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb. The statute indicates that it applies "in all cases where free exercise of religion is substantially burdened." *Id.* In order to ensure that the statute would protect even the most obscure or idiosyncratic religious practices, Congress defined "exercise of religion" to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5. Congress further instructed that this language "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g). RFRA's text requires that the government refrain from substantially burdening any religious exercise, rather than a privileged few, unless it can demonstrate a compelling justification. *Id.* § 2000bb-1.

The Tenth Circuit's opinion below undermines RFRA's broad sweep by limiting its coverage to those religious exercises that judges deem substantial enough to protect. Unpopular or minority beliefs, the ones most likely to need protection from majoritarian impulses, are the beliefs most likely to be left unprotected under such a standard.

B. Contrary To the Tenth Circuit's Holding, Congress Did Not Authorize Judges To Rule on the Validity of an Adherent's Understanding of His Own Religious Practices.

The Tenth Circuit mistakenly determined that RFRA empowers courts, rather than religious adherents, to determine the compatibility between a law and a religious exercise. *Little Sisters*, 2015 WL 4232096, at *18. Under this interpretation, if a court determines that a plaintiff has misunderstood the substantiality of his own religious beliefs, the government is excused from showing a compelling justification for its rule. Such a determination is indistinguishable from determining the validity of a religious belief.

The Tenth Circuit then determined that the plaintiffs were mistaken in their sincere belief that complying with the Health and Human Services ("HHS") Accommodation would render them religiously complicit with sinful behavior or would otherwise substantially burden their religious exercise. *Id.* at *20–*21, *29–*31. The court therefore refused to investigate whether the government presented a compelling justification for refusing to exempt the Little Sisters from the HHS Accommodation. *Id.* at *32. An understanding of RFRA that could lead to such a result is unworkable and plainly wrong.

i. In Order To Determine Whether a Law Imposes a Substantial Burden on Religious Exercise, Courts Should Examine the Burden Imposed on Adherents Who Refuse To Follow the Law Rather Than Attempt To Adjudicate Religious Beliefs.

In the *Hobby Lobby* case, this Court rejected an argument indistinguishable from the argument adopted by the Tenth Circuit below. 134 S. Ct. at 2777–79. In that case, the government argued that the "the connection between what the objecting parties must do . . . and the end they find morally wrong . . . is simply too attenuated" to constitute a substantial burden. This Court rejected that argument and refused to "tell the plaintiffs that their beliefs are flawed," describing the inquiry proposed by the government as a "question that the federal courts have no business addressing . . . ." *Id.* at 2778.

As this Court noted, in order to establish that a law imposes a substantial burden on religious exercise, RFRA only requires courts to determine whether the plaintiff's religious claims reflect an " 'honest conviction' " and whether the consequences of violating the law are significant. *Id.* at 2779 (quoting *Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707 (1981)). In *Hobby Lobby,* this Court concluded that "[b]ecause the contraceptive mandate forces [plaintiffs] to pay an enormous sum of money . . . if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

In *Holt v. Hobbs*, this Court reaffirmed that judges have no role in questioning the merits of a religious individual's sincerely held beliefs. 135 S. Ct. 853 (2015). The Court refused to consider various theological arguments as to why requiring a Muslim prisoner to shave his beard did not constitute a substantial burden on his religious exercise. *Id.* at 862–63. A lower court in that case had found that the prisoner's religious exercise was not substantially burdened by the prison's beard policy because "his religion would 'credit' him for attempting to follow his religious beliefs," he exercised his religion in other manners, and other Muslim men were willing to shave. *Id.* This Court rejected each of those arguments, noting that the burden was substantial because "if petitioner contravenes that policy and grows his beard, he will face serious disciplinary action." *Id.* at 862.

This Court should grant certiorari in order to reaffirm the commonsense rule that a law places a substantial burden on religious exercise whenever it imposes a significant penalty on a religious person for refusing to violate a religious dictate.

ii. The Tenth Circuit's Explanation That It Rejected the Plaintiffs' Understanding of the Interplay Between the Law and Their Religious Obligations Is Indistinguishable From Rejecting the Plaintiffs' Understanding of Their Religious Obligations.

The Tenth Circuit attempted to distinguish this case from *Hobby Lobby* and *Holt* by stating that it was evaluating "how the law or policy being challenged actually operates and affects religious exercise" rather than the underlying religious exercise. *Little Sisters*,

2015 WL 4232096, at *19. However, an analysis of the interplay between laws and religious beliefs inevitably requires a court to evaluate the relevant religious beliefs. In order to determine how substantially a law interacts with a religious obligation, a court necessarily has to establish the bounds of both the law and the religious obligation. The question of how a law "affects religious exercise" is precisely the "question that the federal courts have no business addressing . . . ." *Hobby Lobby*, 134 S. Ct. 2751 at 2778.

The decision below illustrates why such an impermissible inquiry is inevitable under the Tenth Circuit's test. The plaintiffs argued that their religion prohibited them from undertaking "any action that would make it appear that they had either provided [sterilizations, contraceptives, and abortifacients] or authorized someone else to provide them." Brief of Appellants at 30, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, No. 13-1540 (10th Cir. Feb. 24, 2014). They also argued that participating in the Accommodation would "make them morally complicit in sin," "contradict their public witness to the value of life," and "immorally run the risk of misleading others." *Id.* at 18.

The Tenth Circuit found the nuns' arguments "unconvincing" because, in its opinion, complying with the Accommodation would not cause the plaintiffs to transgress the religious prohibitions they cited. *Little Sisters*, 2015 WL 4232096, at *29. The court listed several reasons for this conclusion. In each instance, the court claimed that it was merely interpreting the regulation, but each reason required it to reach philosophical and theological conclusions as well as legal ones.

The court held that complying with the Accommodation would not cause the plaintiffs to transgress the prohibition on complicity because, "the purpose and design of the accommodation scheme is to ensure that plaintiffs are not complicit . . . ." *Id.* This explanation only supports the conclusion that the petitioners are mistaken about their complicity if, as a theological matter, the Accommodation achieved the goals it was allegedly intended and designed to accomplish.

Regardless of the government's intent, an accommodation telling Orthodox Jewish prisoners that they can shave with electric shavers rather than traditional razors would not lessen the burden on the prisoners' religious exercise if the particular electric shavers also fell into the prohibited category. Rabbi Moshe Heinemann, *Electric Shavers*, STAR-K ONLINE, goo.gl/Vjw4yu (last visited Aug. 16, 2015). After all, RFRA expressly protects religious exercise from laws that unintentionally burden such religious exercise. 42 U.S.C. § 2000bb-1. Determining whether the Accommodation accomplished its alleged aims necessarily required the court to reevaluate the plaintiffs' sincerely held religious beliefs.

The court stated that the plaintiffs do not risk misleading others by complying with the Accommodation, since doing so is a form of objection. *Little Sisters*, 2015 WL 4232096, at *29. This conclusion requires the court to determine the level of risk that is religiously permissible. If Catholic nuns believe that even a small or theoretical risk is religiously impermissible, judges are in no position to contradict them.

Orthodox Jews observe similar prohibitions against creating the appearance of religious impropriety. Those prohibitions apply even in situations where

judges might determine that there is little risk of misleading others. According to the Talmud, a collection of rabbinic commentary on Jewish law, the prohibition against acting in a manner that may mislead others applies even in the privacy of one's home. Babylonian Talmud, Sabbath 64b.

The court also found that the Accommodation does not impose a substantial burden because it allows the plaintiffs to continue speaking out against the regulation. *Little Sisters*, 2015 WL 4232096, at *29. This is no different than the suggestion in *Holt* that the religious burden was insubstantial because the prisoner could pursue his religious exercise through alternative means. *Holt*, 135 S. Ct. at 862. This Court rejected that argument in *Holt*, and there is no reason to accept it here.

The decision below held that the "*de minimis*" and "minimal" nature of the tasks required by the Accommodation meant that it could not substantially burden the plaintiffs' religious exercise. *Little Sisters*, 2015 WL 4232096, at *30. In doing so, the court equated the amount of effort required to perform a task with its religious significance. There is no basis for such a conclusion, even if a court could permissibly consider such a question.

Indeed, to an Orthodox Jew, many effortless tasks such as turning on a light on Saturday, wearing a garment made of wool and linen, or shaving with a razor are violations of biblical commandments. The correlation, if any, between the amount of effort required to complete a task and its religious significance is a theological decision rather than a legal one.

iii. Requiring a Religious Individual To Undertake an Administrative Task Prior To Exercising His Religion Is Distinct From Requiring Him To Undertake an Administrative Task That Is Itself Prohibited by His Religion.

The Tenth Circuit conflated requiring an individual to undertake a *de minimis* administrative task prior to engaging in a religious exercise with requiring that individual to engage in an administrative task which itself constitutes a grave violation of his religious obligations. *Id.* at *30, *32. A religious person can hardly be said to take advantage of an accommodation when it is the accommodation itself that violates his religious liberty.

Requiring an Orthodox Jewish prisoner to fill out a form requesting kosher food likely would not constitute a substantial burden, since it only requires him to undergo a minor administrative task prior to exercising his religion. However, requiring that same prisoner to fill out the exact same form on Saturday would impose a substantial burden, since writing constitutes a desecration of the Sabbath. Rules that require a religious person to take an action that violates his religion or face significant consequence constitute substantial burdens, no matter how *de minimis* that action might appear to a religious outsider.

C. Deferring To a Religious Adherent's Understanding of His Religious Beliefs Does Not Necessarily Exempt Him from a Law. It Merely Shifts the Burden To the Government To Demonstrate That the Law Is Necessary To Further a Compelling Government Interest.

Once a court accepts that a law substantially burdens a person's religious exercise, the government can defend the law at issue by showing that it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

This is the stage of a case where courts should consider the type of arguments presented by the court below. Perhaps the actions required by the Accommodation are so minimal that there is no less restrictive way for the government to satisfy its aims.[2] If that is the case, the government may be able to carry its burden. However, courts should not avoid making those determinations by dismissing religious people's sincerely held beliefs as insubstantial.

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[2] This is unlikely given this Court's order in *Wheaton Coll. v. Burwell*, 134 S. Ct. 2806 (2014), but this brief takes no position on the ultimate disposition of that question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL.,

Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of the Southern Baptist Theological Seminary, the Ethics & Religious Liberty Commission, the International Mission Board, and Dr. R. Albert Mohler, Jr. as *amici curiae* in support of Petitioners

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INTEREST OF *AMICI CURIAE*[1]

The Southern Baptist Theological Seminary ("SBTS") is the oldest of the six seminaries affiliated with the Southern Baptist Convention ("SBC") and is one of the world's largest theological seminaries, with a full-time enrollment of over 2,000 students. Located in Louisville, Kentucky, SBTS currently enrolls students from all 50 states and 41 countries. SBTS exists to serve the churches of the SBC by training, educating, and preparing ministers of the gospel for faithful service. From its founding in 1859 until the present day, the SBTS charter asserts that "God alone is Lord of the conscience; and He hath left it free from the doctrines and commandments of men, which are in anything contrary to His word, or not contained in it." SBTS believes that the government mandate at issue in this petition infringes on that venerable tradition of religious liberty and freedom of conscience.

The Ethics and Religious Liberty Commission ("ERLC") is an entity of the SBC, the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is dedicated to engaging the culture with the gospel of Jesus Christ and speaking to issues in the public square for the protection of religious liberty and human flourishing. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

freedom, marriage and family, and the sanctity of human life. Religious freedom is an indispensable, bedrock value for Southern Baptists. The ERLC fears the government mandate at issue threatens the Constitution's guarantee of freedom from governmental interference in matters of faith, a crucial protection upon which SBC members and adherents of other faiths depend as they follow the dictates of their conscience in the practice of their faith.

The International Mission Board ("IMB") is an entity of the SBC dedicated to taking the gospel of Jesus Christ to all nations and peoples in fulfillment of the Great Commission found in Matthew 28:18-20. To achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior, the IMB employs more than 5,000 Christian workers.

Dr. R. Albert Mohler, Jr. is the President of SBTS, the flagship school of the SBC and one of the largest seminaries in the world. Dr. Mohler has been recognized as one of the leading intellectuals among American evangelicals, has been quoted in the nation's leading newspapers, and has appeared on numerous news and commentary television broadcasts. He has authored several books and is the editor-in-chief of *The Southern Baptist Journal of Theology*.

SUMMARY OF ARGUMENT

Requiring Christians—including the Southern Baptist entities among the Petitioners—to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion in violation of the Religious Freedom Restoration Act and the First Amendment to the United States Constitution. A fundamental aspect of Christian doctrine is its requirement that faith must govern every aspect of a Christian's life. As a matter of scriptural command, conscience, doctrinal tradition, and Southern Baptist teaching, the exercise of the Christian religion must guide and determine a Christian's decisions, words, and deeds in every facet of life, including seemingly "secular" matters like the administration of insurance and the provision of certain drugs and devices.

Because of the holistic nature of the Christian faith, Baptists throughout American history have discerned a spiritual obligation to interact with and influence the culture outside the church doors. This has historically included providing for and protecting the oppressed or defenseless, including the protection of innocent and unborn human life. Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception, beliefs that are grounded in the words of Holy Scripture.

In light of the broad scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners cannot, as a matter of doctrine and conscience, distribute abortion-inducing drugs and devices directly or indirectly by

authorizing, obligating, or incentivizing a third party—and particularly their own third-party administrators—to use Petitioners' health plans to provide such drugs and devices to others. Scripture and Southern Baptist belief prohibit not only direct and personal wrongdoing, but also complicity in doing what the Christian believes to be sin. Christian doctrine teaches that Christians who knowingly aid or abet another's wrongdoing have themselves done wrong. Accordingly, a statute or regulation requiring a Southern Baptist individual or ministry to be complicit in conduct the Christian faith teaches is morally wrong forces that person or ministry into an impossible choice—to either violate conscience or violate the law—and imposes a substantial burden on the exercise of religion.

ARGUMENT

I. Christian doctrine and Southern Baptist belief require that faith govern every aspect of a Christian's life.

A fundamental aspect of Christianity is its requirement that the Christian faith govern all aspects of the believer's life. This teaching is drawn directly from the Holy Scripture and stems from the Christian belief that God's sovereignty extends over every area of human endeavor. *See, e.g., Psalm* 24:1 ("The earth is the Lord's and the fullness thereof, the world and those who dwell therein.").[2] In the words of the English theologian and poet Isaac Watts, God's "love, so amazing, so divine, demands my life, my

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[2] All quotations of Scripture herein are taken from the Holy Bible, English Standard Version.

soul, my all." Isaac Watts, *The Poetical Works of Isaac Watts, Vol. IV* 173 (1782).

Accordingly, Christianity has never limited its reach merely to matters of theology and ceremonial observance. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (agreeing with the Court's unanimous opinion that the job duties of a Lutheran minister engaged in education "reflected a role in conveying the Church's message and carrying out its mission" and observing that "[r]eligious teachings cover the gamut from moral conduct to metaphysical truth."); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam) (finding a Christian humanitarian organization "'working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice'" was a religious activity); *see also* The Baptist Faith & Message 2000, Article XIII ("God is the source of all blessings, temporal and spiritual; all that we have and are we owe to Him. . . . [Christians] are therefore under obligation to serve Him with their time, talents, and material possessions; and should recognize all these as entrusted to them to use for the glory of God and for helping others."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015).[3]

Rather, Christianity teaches that one's faith influences even those areas of life that appear superficially unrelated to worship, prayer, or theology. *See, e.g., Colossians* 3:17 ("And whatever

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[3] The Baptist Faith and Message is the statement of faith of the SBC and summarizes Southern Baptist beliefs.

you do, in word or deed, do everything in the name of the Lord Jesus."). Indeed, Christianity teaches there is spiritual significance in *every* part of life, including seemingly mundane acts like eating, drinking, and working. *1 Corinthians* 10:31 ("So whether you eat or drink or whatever you do, do all for the glory of God."); *Colossians* 3:23-24 ("Whatever you do, work heartily, as to the Lord."); *Ecclesiastes* 3:1-13 (noting "[f]or everything there is a season, and a time for every matter under heaven" and that "everyone should eat and drink and take pleasure in all his toil—this is God's gift to man"). These holistic demands of Christianity require consistency in familial, business, and social relations and are not limited to sacerdotal, ecclesial, or ritual matters.

This integration of a Christian's entire life in relation to God is an outgrowth of the Christian gospel, which provides that God, completely righteous and without sin, by His infinite grace, justifies man who is by nature unrighteous and sinful. This cannot be accomplished by any work or merit by man to somehow achieve good standing with God, but instead is accomplished by and through the work of Jesus Christ's death on the cross. Thus, by faith alone in Christ alone, man is counted righteous by God.

This doctrinal requirement that a Christian must pursue all aspects of his or her life in obedience to Christ compels Christians to do more than give mere intellectual assent. The Christian faith requires not only belief, but also conduct, and this requirement extends to every facet of the Christian's life. *See James* 2:17 ("So also faith by itself, if it does not have works, is dead."); *Romans* 12:1 (urging Christians, "in view of God's mercy," to devote their entire beings

to Him as "true and proper worship"); *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (noting religious belief is not confined to the home and the house of worship because "[r]eligious people do not practice their faith in that compartmentalized way."); The Baptist Faith & Message 2000, Article XV ("All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society. . . . Every Christian should seek to bring industry, government, and society as a whole under the sway of the principles of righteousness, truth, and brotherly love.").

Scripture and history are replete with instances in which Christian believers who were presented with a choice either to violate their consciences by complying with the state's demands or to face draconian penalties chose to maintain the integrity of their faith in every aspect of life and accept the consequences. *See generally* John Foxe, *Acts and Monuments* (1563) (recounting anecdotes of early Protestant martyrs). For example, the Old Testament Scripture recounts the story of three Hebrew men who refused to worship an image of Babylonian King Nebuchadnezzar, despite the threat of execution for noncompliance. *Daniel* 3:1-30. Shadrach, Meshach, and Abednego were cast "into the burning fiery furnace" for refusing to worship the king's image. *Id.* Although the Babylonian government conceived the requirement of bowing down to the image as merely an act of political loyalty, the three young men understood it as a requirement to violate their faith through idolatry. *Id.*

Similarly, the second-century Christian martyr Polycarp was willing to suffer death for refusing to state "Caesar is Lord." *See* Justo L Gonzalez, *The*

Story of Christianity, Vol. 1, 43–44 (1984). To the Roman government, the law was merely a political issue, but to Polycarp, it was an issue of idolatry. Likewise, the Protestant reformer Martin Luther, when asked to recant his beliefs, famously stated to Emperor Charles V, "[M]y conscience is captive to the Word of God. I cannot and I will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen." Martin Luther, *Luther's Works, Vol. 33: Career of the Reformer III* (1972).

Baptist history in America abounds with examples of the doctrinal connection between faith and practice, even when that faith compelled action that ran contrary to the social mores of the day. For example, Roger Williams—founder of the first Baptist church in America—founded the only colony to prohibit slavery and tolerate religious dissenters. *See* Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. Jefferson L. Rev. 1, 14 n. 73 (2010) (noting that the colony of Rhode Island, under Williams' leadership, "prohibited slavery, tolerated Quakers and Jews, and endeavored to maintain peaceful relations with the Pequod Indians, who had been the victims of massacre and enslavement by the Massachusetts settlers"). Similarly, John Leland, a widely known Baptist minister in colonial Virginia, was a staunch abolitionist and a firm voice in support of religious liberty, free from government coercion and control:

> "Does a man upon entering into social compact surrender his conscience to that society to be controled by the laws thereof . . . ?" I judge not, for the following reasons:

> 1. Every man must give an account of himself to God, and therefore every man ought to be at liberty to serve God in that way that he can best reconcile it to his conscience. If government can answer for individuals at the day of judgment, let men be controled by it in religious matters; otherwise let men be free.

John Leland, *The Right of Conscience Inalienable* (1791), *available at* http://berkleycenter.georgetown.edu/resources/quotes/john-leland-the-right-of-conscience-inalienable-on-religion-as-a-matter-between-god-and-individuals (last visited August 7, 2015); *see also* Mark S. Scarberry, *John Leland and James Madison: Religious Influence on the Ratification of the Constitution and on the Proposal of the Bill of Rights*, 113 Penn St. L. Rev. 733 (2009).

In light of these Scriptural commands, Christian doctrine, and Baptist tradition, it is no surprise that the types of work done by Petitioners, *amici*, and related organizations—*e.g.*, funding and organizing international missions, educating students and church members from a Christian perspective, and providing physical and spiritual care for orphans and widows—are, in fact, spiritual obligations that are ministerial and sacred in nature. *See, e.g.*, *Matthew.* 25:37-40; *Matthew* 28:19; *James* 1:27; *see also* The Baptist Faith and Message 2000 Art. XII ("An adequate system of Christian education is necessary to a complete spiritual program for Christ's people."); The Baptist Faith and Message 2000 Art. XV ("We should work to provide for the orphaned, the needy, the abused, the aged, the helpless, and the sick."); SBC Resolution On Adoption and Orphan Care, 2009

("[W]e encourage local churches to champion the evangelism of and ministry to orphans around the world."), *available at* http://www.sbc.net/resolutions/1194 (last visited August 7, 2015). In light of that spiritual duty, it is not surprising that Petitioners refuse to quail before the government's demand to violate conscience or suffer government sanction.

In sum, because Christian doctrine requires that faith govern every aspect of a Christian's life and teaches that a Christian's conscience is captive to the word of God, Christians must act in accordance with their beliefs and in integrity of conscience in every aspect of life. Simply stated, the exercise of Christian faith must, as a matter of scriptural teaching, church tradition, and denominational doctrine, guide and determine a Christian's decisions, choices, words, and deeds, both in private and in every facet of life.

II. Scripture and Southern Baptist doctrine teach that life begins at conception and therefore abortion is the taking of innocent human life and is a grave moral wrong.

Southern Baptists have spoken clearly in opposition to abortion and in support of their belief that life begins at conception. These beliefs are grounded in the words of Scripture, which teach that God's knowledge of, care for, and sovereign plan for each person begins long before birth. *See Jeremiah* 1:4-5 ("Now the word of the Lord came to me, saying, 'Before I formed you in the womb I knew you, and before you were born I consecrated you; I appointed you a prophet to the nations.'"); *Psalm* 139:13-16 (noting that God "formed my inward parts . . . knitted me together in my mother's womb," and knew "the days that were formed for me, when as yet

there was none of them"); *Luke* 1:39–44 (recounting that when Elizabeth, who was pregnant with John the Baptist, met Mary who would be the mother of Jesus, "the baby in [her] womb leaped for joy").

These and other Scriptural teachings can be distilled into four core principles undergirding the Baptist pro-life belief. First, God holds human life in high regard because "God created man in his own image." *Genesis* 1:27. Being made in the image of God stamps every human life with intrinsic worth and dignity. Second, Scripture teaches that a mother's womb contains a living human being created by God. Thus, abortion ends a human life. For example, in Luke 1:39–44, the inspired author of the Scripture describes the "baby" (Gr. βρεφος) in Mary's womb using the same word as is elsewhere used to describe an infant who has been born. The same scriptural passage affirms the personhood of the baby in the womb by ascribing to him the quintessentially human emotion of "joy." Third, God's word consistently condemns the killing of innocent human beings. *See Proverbs* 6:16–17 (declaring that God "hates . . . hands that shed innocent blood."); *Psalm* 106 (describing how the "anger of the Lord was kindled" when his people "poured out innocent blood, the blood of their sons and daughters"). Finally, God calls his followers to "open your mouth for the mute, for the rights of all who are destitute," *Proverbs* 31:8, and, as there is "opportunity[,] . . . do good to everyone," *Galatians* 6:10. No one is more mute or defenseless than the 1.2 million unborn slain annually in the United States through abortion.

In keeping with these Scriptural teachings, Southern Baptists stand firmly in support of the sanctity of human life, including the unborn. *See* The

Baptist Faith and Message 2000 Art. XV ("We should speak on behalf of the unborn and contend for the sanctity of all human life from conception to natural death."); *id.* at Art. XVIII ("Children, from the moment of conception, are a blessing and heritage from the Lord."); SBC Resolution On Adoption and Orphan Care, 2009 ("Southern Baptists have articulated an unequivocal commitment to the sanctity of all human life, born and unborn."); SBC Resolution On Thirty Years of *Roe v. Wade*, 2003 ("The Bible affirms that the unborn baby is a person bearing the image of God from the moment of conception."); SBC Resolution on Sanctity of Human Life, 1991 ("Southern Baptists have historically affirmed biblical teaching regarding the sanctity of human life by adopting numerous pro-life resolutions at the national, state, and local levels."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("Southern Baptists have historically upheld the sanctity and worth of all human life, both born and preborn, as being created in the image of God."); SBC Resolution on Abortion, 1984 (noting an unborn child "is a living individual human being").[4]

In accordance with these beliefs about unborn human life, Southern Baptists have a firm and well-known theological opposition to abortion, and the Southern Baptist Convention has repeatedly expressed its opposition to abortion in the strongest

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[4] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/1130/on-thirty-years-of-roe-v-wade, http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www.sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

terms. *See* SBC Resolution On Adoption and Orphan Care, 2009 ("The satanic powers and the ravages of sin have warred against infants and children from Pharaoh to Molech to Herod and, now, through the horrors of a divorce culture, an abortion industry, and the global plagues of disease, starvation, and warfare."); SBC Resolution On Planned Parenthood, 2008 ("Scripture speaks to the sanctity of human life in the womb [] and God's abhorrence of those who murder the innocent."); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e . . . affirm the biblical prohibition against the taking of unborn human life except to save the life of the mother; and . . . we call on all Southern Baptists to work for the adoption of pro-life legislation in their respective states which would expand protection for unborn babies."); SBC Resolution On Encouraging Laws Regulating Abortion, 1989 ("[T]he messengers to the annual meetings of the Southern Baptist Convention during the past decade have repeatedly reaffirmed their opposition to legalized abortion, except in cases where the mother's life is immediately threatened . . . [and] we do reaffirm our opposition to legalized abortion."); SBC Resolution on Abortion, 1984 (characterizing abortion-on-demand as a "national sin").[5]

In addition, Southern Baptists have expressly opposed the use of abortion-inducing drugs such as

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[5] Resolutions available at http://www.sbc.net/resolutions/1194/on-adoption-and-orphan-care, http://www.sbc.net/resolutions/1191/on-planned-parenthood, http:// www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life, http://www. sbc.net/resolutions/23/resolution-on-encouraging-laws-regulating-abortion, and http://www.sbc.net/resolutions/21/resolution-on-abortion (links last visited August 7, 2015).

the so-called morning-after pill because such drugs kill an unborn human person. *See* SBC Resolution on RU 486, 1994 ("RU 486, the French abortion pill, is a direct assault on the sacredness and value of unborn human life in that this drug kills an unborn child whose heart has already started to beat."); SBC Resolution on Sanctity of Human Life, 1991 ("[W]e oppose the testing, approval, distribution, and marketing in America of new drugs and technologies which will make the practice of abortion more convenient and more widespread.").[6]

In keeping with these Baptist beliefs and historic Protestant beliefs,[7] prominent Southern Baptist theologians and ministers have and continue to decry the grave moral wrong of abortion. *See* R. Albert Mohler, Jr., *"I Feel Super Great About Having an Abortion"—The Culture of Death Goes Viral*, May 8, 2014; ERLC Letter to Congress on No Taxpayer Funding for Abortion Act, January 27, 2014; R. Albert Mohler, Jr., *So What if Abortion Ends a Life? Rare Candor from the Culture of Death*, February 1,

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[6] Resolutions available at http://www.sbc.net/resolutions/25/resolution-on-ru-486-the-french-abortion-pill; http://www.sbc.net/resolutions/619/resolution-on-sanctity-of-human-life (links last visited August 7, 2015).

[7] Indeed, the Reformers denounced abortion as a grave moral evil. *See, e.g.*, Martin Luther, *Luther's Works, Vol. 4: Lectures on Genesis Chapters 21-25* at 304 (tr. Jaroslav Pelikan, 1999) ("How great, therefore, the wickedness of human nature is! How many girls there are who prevent conception and kill and expel tender fetuses, although procreation is the work of God!"); John Calvin, *Commentaries on the Last Four Books of Moses*, Vol. 3 at 51-52 (tr. Charles Bingham, 1852) ("[T]he foetus, though enclosed in the womb of its mother, is already a human being, and it is almost a monstrous crime to rob it of the life which it has not yet begun to enjoy.").

2013; R. Albert Mohler, Jr., *"Abortion is as American as Apple Pie"—The Culture of Death Finds a Voice*, January 20, 2012;[8] Carl F.H. Henry, *Has Democracy Had Its Day?* at 28-29 (1996) (commending those "who resisted the federal government's intrusion into the sphere of religious values, notably . . . the public funding of abortion"); Carl F.H. Henry, *Twilight of a Great Civilization* at 34 (1988) ("[W]hen government engages in programs that violate Christian conscience, such as funding abortions, . . . bold protest is proper.").

These beliefs and obligations guide not only Southern Baptist ministers and individuals, but also instruct the policy and practice of all Southern Baptist ministries and entities. *See* SBC Resolution on Abortion, 1987 ("[W]e encourage all agencies and institutions of the SBC to use their resources and program ministries to promote the sanctity of human life."), *available at* http://www.sbc.net/resolutions/22/resolution-on-abortion (last visited August 7, 2015).

In light of the clear Southern Baptist conviction on the sanctity of life and the moral wrong of abortion, it is no surprise that Southern Baptist entities like Petitioners refuse to provide abortion-inducing drugs either directly or indirectly by authorizing, obligating, or incentivizing their health care providers to do so using Petitioners' health plan information and infrastructure.

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[8] *Available at* http://www.albertmohler.com/2014/05/08/i-feel-super-great-about-having-an-abortion-the-culture-of-death-goes-viral/; http://www.erlc.com/documents/pdf/20140127-ltr-house-ntffaa.pdf; http://www.albertmohler.com/2013/02/01/so-what-if-abortion-ends-a-life-rare-candor-from-the-culture-of-death/; http://www.albertmohler.com/2012/01/20/abortion-is-as-american-as-apple-pie-the-culture-of-death-finds-a-voice/ (links last visited August 7, 2015).

III. Christian doctrine and Southern Baptist teaching state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong.

As a result of the holistic scope of the Christian faith and the Southern Baptist theological opposition to abortion, the Petitioners, as a matter of doctrine and conscience, cannot distribute abortion-inducing drugs and devices either directly or indirectly by authorizing, obligating, or incentivizing their own third-party administrators to use Petitioners' health plans to provide such drugs and devices to others. Christian doctrine, like the civil and criminal law of this nation, teaches that one who knowingly aids or abets another's wrongdoing has himself done wrong. *See, e.g., Matthew* 18:6 ("[W]hoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."); *Romans* 14:13-14 ("Therefore let us not pass judgment on one another any longer, but rather decide never to put a stumbling block or hindrance in the way of a brother" and thus cause them to sin); *1 Corinthians* 8:9-13 (warning Christians to take care not to be a "stumbling block" to others and noting that by "sinning against your brothers and wounding their conscience when it is weak, you sin against Christ"); *The Larger Catechism of the Westminster Assembly* 245 (1841) ("That what is forbidden or commanded to ourselves, we are bound, according to our places, to endeavour that it may be avoided or performed by others.").

This principle applies with particular force to situations in which a Christian's action or inaction involves the taking of life. *See The Large Catechism*

by Martin Luther (1529), reprinted in *Triglot Concordia: The Symbolical Books of the Ev. Lutheran Church* (1921) ("So also, if you see any one innocently sentenced to death or in like distress, and do not save him, although you know ways and means to do so, you have killed him."); Thomas Vincent, *An Explanation of the Assembly's Shorter Catechism* 171-72 (1806) ("We are forbidden to kill . . . others, either directly . . . or indirectly, by doing any thing that tendeth thereunto. . . . We may be guilty of the murder of . . . others, indirectly, by doing any thing that tendeth to take away . . . others lives.").

Congress and State legislatures have long recognized that one's sincere religious beliefs may prevent him from approving, authorizing, or aiding another in something the believer considers to be wrong, even if the believer is not himself committing the underlying wrong. For example, Congress exempts religious conscientious objectors not only from combat roles but from participation "in any form" in war. 50 U.S.C. App. § 456(j); *Hanna v. Secretary of the Army*, 513 F.3d 4 (1st Cir. 2008) (upholding permanent injunction exempting Coptic Christian physician from active duty because she could not perform her chosen profession in the military context without violating her deeply held religious beliefs). Also, physicians and hospitals with a religious objection to abortion are exempt not only from performing abortion but also from assisting, making their facilities available, or even making referrals for abortion. 42 U.S.C. § 300a-7; 42 U.S.C. § 238n. Similarly, "eleven states and the federal government have adopted some type of statute or regulation to ensure that individuals are not forced to participate in executions against their will." Mark

L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 139 (2012).

The courts, like the legislatures, recognize that one's religious beliefs may prevent believers from any attenuated authorization or complicity in conduct they consider to be wrong. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1142 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("And the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."); *Gilardi v. U.S. Dept. of Health and Human Servcs.*, 733 F.3d 1208, 1215 (D.C. Cir. 2013), *vacated on other grounds*, 134 S. Ct. 2902 (2014) (noting that "even attenuated participation may be construed as a sin"); *Thomas v. Anchorage Human Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), *vacated on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*) (recognizing a Christian landlord's sincere religious belief that unmarried cohabitation was sin merited exemption from state and local housing laws); *State by Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990) (same, under Minnesota Constitution). Indeed, courts have previously recognized this concept in this very context. *Hobby Lobby*, 723 F.3d at 1140 n.15 ("The assertion that life begins at conception is familiar in modern religious discourse . . . . Moral culpability for enabling a third party's supposedly immoral act is likewise familiar.").

The statutory and judicial religious exemptions enumerated above are notable for several reasons. First, none of them make the applicability of the exemption dependent on whether the religiously

motivated conduct involves "sacred" or seemingly "secular" conduct. *See Attorney Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994) ("The fact that the defendants' free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened."). Second, they recognize that religious belief not only prevents believers from engaging directly in sin but also prevent *any* participation, authorization, or enabling of what they consider to be sin. *See* Rienzi, 62 Emory L.J. at 139 (noting the statutory exemptions from participating in capital punishment "protect the individual not only from direct involvement—such as personally administering a lethal injection or turning on the electric chair—but also less direct involvement such as preparing the individual and apparatus used, supervising other people who will do these things, or even attending the execution."). Finally, many of these exemptions involve situations involving the taking of human life, recognizing that to compel individuals to participate in what they believe to be an unjustified taking of life imposes a grievous burden on the exercise of their beliefs.

Here, like in the foregoing examples, the Petitioners' refusal to be complicit in wrongdoing is in no way undercut by the fact that Southern Baptists, like other Christians over the past two millennia, pay taxes that may ultimately be used to fund objectionable acts. The payment of taxes is distinguishable in several ways. First, Jesus expressly commanded his followers to do so—a command given to hearers who would have found many of Caesar's activities to be objectionable—while simultaneously recognizing that payment of taxes

did not forfeit a believer's primary obligations to follow God's commands. *See Mark* 12:17 ("Jesus said to them, 'Render to Caesar the things that are Caesar's, and to God the things that are God's.'"). Second, the act of paying a tax does not itself require one citizen to intentionally, directly, and personally obligate, authorize, incentivize, or materially assist another citizen to engage in known objectionable conduct. In contrast, the HHS mandate forces the Petitioners to sign and deliver a form with the purpose of expressly authorizing or incentivizing the use of Petitioners' own health plan information and infrastructure to provide abortion-inducing drugs; drugs whose sole purpose and use is inherently morally objectionable and which otherwise would not be provided. Third, the vast majority of each tax dollar paid by Petitioners is spent on things that they do not find inherently morally objectionable, a fact that comports with the Scriptural recognition that a proper function of the state is to do good and punish evil. *See Romans* 13:3-7. Here, in contrast, the certain effect of participating in the mandate scheme is to authorize, obligate, or incentivize Petitioners' third-party administrators to engage in specific conduct Petitioners find morally objectionable, and in a way that requires Petitioners' ongoing support and assistance (by maintaining and regularly updating the health plan information and infrastructure).

In analogous contexts, courts have implicitly recognized a distinction between complicity in wrongdoing and the mere payment of taxes. For example, the Supreme Court has recognized that a pacifist has a legitimate moral objection to being forced to work in a factory making war goods. *See Thomas v. Review Bd. of Indiana Employment Sec.*

Div., 450 U.S. 707 (1981). The fact that Thomas also paid taxes that were used to support the war effort did not scuttle his argument that manufacturing weapons made him complicit in the war and thus violated his religious beliefs.

In sum, scriptural teaching and Southern Baptist doctrine state it is a sin for a Christian to enable or aid another in doing what the Christian believes to be wrong. As a matter of doctrine and conscience, Petitioners cannot comply with the government's mandate to delegate to another the repugnant task of distributing abortion-inducing drugs and devices.

IV. Requiring Christians to choose between violating the Government's regulations or violating their sincerely held religious beliefs substantially burdens their exercise of religion.

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, prohibits the federal government from substantially burdening "a person's exercise of religion," *id.* at § 2000bb-1(a), unless applying that burden is the "least restrictive means of furthering . . . [a] compelling governmental interest," *id.* at § 2000bb-1(b). In enacting RFRA, Congress sought to restore the compelling interest test for defenses to claims that a facially neutral law of general applicability "substantially burdens" the free exercise of religion—a test that had been abandoned by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are: (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*,

406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially burdened*.") (emphasis added). Thus, RFRA creates a statutory right to exemption from laws that substantially burden sincere religious beliefs, even if the law is neutral and generally applicable, unless the government can prove that "strict scrutiny" is met. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

The existence of a substantial burden is most apparent when the government forces a person or group to "perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding that compulsory formal secondary education was an undue burden on the free exercise of Amish parents' religion). Further, a substantial burden can arise indirectly if the receipt of benefits is conditioned on the performance of conduct proscribed by a religious faith, or benefits are denied because of conduct required by a religious faith. *Thomas*, 450 U.S. at 717–18 (determining that a denial of unemployment benefits to an employee who had a religious objection to war was a burden on his religion).

As a threshold matter, the religious objection or conduct at issue must be both sincere and religious. *Hobby Lobby*, 723 F.3d at 1140. The religious belief is not, however, required to be central to the person's faith, 42 U.S.C. § 2000cc-5(7)(A), nor is it required to be a "correct" interpretation. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("Courts are not arbiters of scriptural interpretation."); *id.* at 261 n.12 (courts cannot "speculate whether" the peculiarities of a legal scheme "ease or mitigate the perceived sin of participation") (quoting *Thomas*, 450 U.S. at 716)).

Instead, a party must only show an "honest conviction" that the pressure from the government substantially conflicts with his religion. *Thomas*, 450 U.S. at 716. Rather than questioning the validity of the belief, the court undertaking the substantial burden analysis under RFRA should focus on the intensity of the coercion applied by the government, requiring that the restrictive law protect "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Christian doctrine requires Christian individuals and entities to consistently conduct themselves in accordance with their beliefs. *See* Part I, *supra*. Furthermore, Christians should not be required to abandon the task to which they have been called by God solely because of governmental intrusion and penalties. *See* The Baptist Faith & Message 2000, Art. XVII ("Civil government being ordained by God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. . . . The state has no right to impose penalties for religious opinions of any kind."), *available at* http://www.sbc.net/bfm2000/bfm2000.asp (last visited August 7, 2015). Forcing Southern Baptist entities like Petitioners to choose between paying crippling fines by conducting their ministries in accord with their religious tenets or sacrificing those core values in order to preserve the ministry is exactly the type of coercion the substantial burden test encompasses.

The Supreme Court has previously recognized that sincerely-held religious beliefs subject to government pressure at the workplace can result in a substantial burden on religion. *Thomas*, 450 U.S. at 716 (finding a substantial burden where an employee with a religious belief against producing war

materials was denied unemployment benefits after quitting when transferred to a factory producing tank turrets); *Sherbert*, 374 U.S. at 404 (holding the denial of unemployment benefits placed a substantial burden on a Seventh-Day Adventist who quit her job after being forced to work on Saturday).

Significantly, the government has recognized this substantial burden by establishing exemptions for other religious groups cornered into making this choice. *See* 45 C.F.R. § 147.131 (2013) (allowing HRSA to exempt religious employers from requirement to cover contraceptive services under group health plan); *see also* 78 Fed. Reg. 39870 (July 2, 2013) ("[G]roup health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the otherwise applicable requirement to cover certain contraceptive services"). The discrimination involved in the Government's exemption of *some* groups only compounds the burdensome nature of the fines imposed on non-exempt groups that share the same religious views. *Sherbert*, 374 U.S. at 406 (noting a prohibition against requiring employees to work on Sunday compounds the unconstitutionality of forcing a Sabbatarian to work on Saturday).

In sum, the government's mandate substantially burdens the religious exercise of Petitioners' Christian ministries by imposing draconian fines for acts specifically mandated by Christian doctrine.

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant the petition for a writ of certiorari and set the case for plenary review of whether centuries-old religious groups may practice their historic beliefs free from intrusive regulation.

Respectfully submitted,

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No. 15-105

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL., PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, OHIO, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are the States of Texas, Ohio, Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. They support review of the questions presented because of their interest in the participation of religious nonprofits as vibrant and vital threads in the social fabric of the States. Religious nonprofits serve their communities in a variety of ways, from caring for the youngest members of society, to serving the elderly with compassion, to providing the educations that allow individuals to pursue their own contributions. It is paramount to the *amici* States that religious nonprofits such as the institutions here can continue with those contributions. But erecting impediments to their continued adherence to their religious beliefs can threaten their continued work, which is driven and shaped by those beliefs.

Moreover, the States have a substantial interest in ensuring that courts and the federal government respect religious beliefs by refusing to second-guess religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. The States' commitment to guarding the dignity of religious convictions is reflected in many of the States' own laws. Twenty States statutorily protect religious liberty

from government intrusion.[1] Others States include in their constitutions protections that go beyond rights recognized under the Free Exercise Clause of the First Amendment.[2]

The *amici* States thus have a substantial interest in protecting religious exercise from governmental intrusion. That interest is even more acute when religious practice is burdened not by congressional enactments, but by federal executive directives that do not pursue their ends in the manner least restrictive of religious liberty. Such executive action skirts the rules laid down in RFRA, a bipartisan enactment about the respect due to religious adherents in our pluralistic society.

SUMMARY OF ARGUMENT

The Little Sisters of the Poor seek a more modest exemption from the contraceptive mandate than is already afforded to many employers for secular reasons. The government already excludes from the contracep-

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[1] Such general laws, often called State RFRAs, have been enacted in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See infra* p. 27 (citations).

[2] *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

tive mandate employers with a "grandfathered" insurance plan, meaning a plan that has not been materially changed after a cutoff date (which was before the contraceptive mandate was proposed). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). That limitation is provided as an administrative convenience to employers, and it covers about 50 million people (as of 2013). *Id.* at 2764. Additionally, employers of fewer than 50 full-time workers are not subject to the mandate, and those employers collectively employ about 34 million people. *Id.*

Petitioners seek a similar exclusion. Their position is based not on the secular burden of administrative inconvenience, but on a sincere religious conviction that complying with the contraceptive mandate is forbidden to them. The government already accommodates that religious conviction by providing an exemption for churches and their integrated auxiliaries—yet another exemption to the mandate. But the Executive refuses to provide that same exemption to other nonprofit religious employers.

RFRA entitles petitioners to scrutiny of the Executive's justification for depriving them of that exemption. The Little Sisters of the Poor and their co-petitioners share with churches the same religious conviction about providing health insurance in a way that does not create legal obligations to provide or facilitate insurance coverage for contraceptives. The existence and sincerity of that religious conviction is not disputed. And the Executive's regulation substantially burdens petitioners in seeking to abide by that religious conviction, as they are subject to substantial

monetary liability for noncompliance. Those conclusions establish that RFRA scrutiny applies.

In considering RFRA, however, several courts have departed from this Court's instructions in *Hobby Lobby*. Under RFRA's substantial-burden inquiry, courts should judge whether the government coerces a person to act in a way the person sincerely believes violates religious principle and whether the coercion is substantial. Going beyond that inquiry—attempting to judge whether the religious conviction itself is valid or justified—inserts courts into areas reserved for religious debate. Religious adherents will not all have the same answers on such theological questions. But for courts to privilege their views on such religious determinations over adherents' views undermines the respect and tolerance enshrined in RFRA.

Whether RFRA allows the lower court's approach to the substantial-burden inquiry is an important question deserving this Court's attention. There is no value to further delay. The issue has sufficiently percolated in the lower courts, and there is no prospect that the confusion will resolve itself with time.

A proper approach to the substantial-burden test will vindicate Congress's design. Rather than the Executive side-stepping any scrutiny of how its contraceptive mandate comports with religious liberty, its regulatory means will be measured against other means that would achieve a compelling governmental interest. That balancing reflects traditions of religious tolerance that are foundational to this country.

And the Executive has not demonstrated that its mandate to petitioners is the least restrictive means

of achieving a compelling governmental interest, as RFRA requires. *See* 42 U.S.C. § 2000bb-1. It is difficult to see a basis for applying this mandate against the Little Sisters of the Poor rather than using whatever methods the government deems acceptable for employees of churches and of other employers already excluded from the mandate.

ARGUMENT

Many employers around the country are driven by their faith to care for their employees by providing them health insurance. But some employers find it incompatible with their religious convictions to provide that health insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to cover contraceptives, including some that are regarded as abortifacients. The validity of such religious line-drawing is not for courts to second-guess:

> Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

Hobby Lobby, 134 S. Ct. at 2778 (footnote omitted).

Before the contraceptive mandate, employers could abide by that religious belief by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives. After the contraceptive mandate, however, some employers are unable to abide by that religious belief

without incurring substantial financial liability. If they provide notice of their objection to contraceptive coverage and continue to engage a company to issue or administer health insurance for their employees, that company is then and only then legally required to cover contraceptives, some of which the religious employers regard as killing human life. The supposed "accommodation" offered by the government does not change that fact, because how a hired company pays for the drugs is immaterial to this religious belief. Hence, the mandate will coerce employers to proceed with a course of action despite a belief in its religious impermissibility, because the alternative is not providing health insurance at all and thus violating federal regulations and incurring serious fines.

That dilemma is faced by only some employers with those religious convictions. The Executive has recognized the religious-liberty burden and therefore exempted churches (as well their integrated auxiliaries and associations of churches) from the contraceptive mandate, relieving them of the coercion to violate their religious beliefs in providing health insurance. Those employers can still hire an insurance issuer or administrator to provide insurance for their employees without violating their religious convictions by that act. *See Hobby Lobby*, 134 S. Ct. at 2763 (noting exemption); 45 C.F.R. § 147.131 (authorizing exemption). There is no apparent reason why the religious-liberty burden that underlies this exemption for churches does not even *count* under RFRA when felt by religious charities, schools, and other nonprofits holding the same religious beliefs.

The contraceptive mandate's ongoing coercion of employers to violate their religious convictions has led to nationwide litigation and confusion about the validity of the mandate in its full reach. Challenges remain pending in multiple circuits, and the circuit and district judges who have addressed this issue have issued lengthy opinions reaching different conclusions.

The cost of that ongoing doubt is significant; it has tremendous financial and spiritual repercussions for objecting employers. Legal challenges continue to simmer nationwide, and there is no visible prospect of orderly resolution without this Court's review. In short, the question whether the alternative method of mandate compliance justifies departure from *Hobby Lobby*'s approach to RFRA is an "important question of federal law" that warrants nationwide resolution. *See* Sup. Ct. R. 10(c); *see also Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The obvious importance of the case prompted our grant of certiorari.").

I. There Is Little Value To Percolation: Uncertainty About How RFRA Applies To The Contraceptive Mandate Will Continue Absent This Court's Review.

The manner in which RFRA's substantial-burden test applies to the contraceptive mandate, now that the government is relying on the mandate's self-described "accommodation," is in serious dispute. *Hobby Lobby* instructs that RFRA's substantial-burden test does not allow courts to question religious adherents' judgment that certain conduct makes the adherents morally complicit and is therefore forbidden to them.

134 S. Ct. at 2778. Under *Hobby Lobby*, the substantial-burden test instead looks at whether a regulation "demands that [practitioners] engage in conduct that seriously violates their religious beliefs," *id.* at 2775, and whether the consequences of not yielding to the regulatory command are substantial, *id.* at 2776 (noting that the fines at issue are "surely substantial"); *id.* at 2779.

The objecting religious nonprofits in the many cases working their way through the courts have made clear their religious conviction that they may not include certain drugs under their insurance or hire an insurance issuer or administrator that then must cover those drugs. No one doubts the sincerity of that conviction. Before the mandate, the religious nonprofits could adhere to that conviction. After the mandate, the nonprofits are forced to proceed in one of those two objectionable ways, or else pay a hefty fine.

Hobby Lobby's reasoning directs that this mandate constitutes a substantial burden on the objectors' religious exercise, as it triggers serious consequences for adherents who decline to behave in a way contrary to their religious beliefs. Nonetheless, several courts of appeals have held that RFRA scrutiny does not even apply on the ground that no substantial burden exists.

Their reasoning creates considerable uncertainty about RFRA's scope. At times, courts overlook the full religious objection by characterizing it differently. The court below, for example, held that by "shifting legal responsibility" from themselves to others, the so-

called accommodation option for mandate compliance "relieves rather than burdens [petitioners'] religious exercise." Pet. App. 49a. But petitioners do not find themselves relieved: as the court acknowledged, they have religious objections to taking actions that create legal obligations for this coverage. Pet. App. 58a (objections to playing "a causal role" and to "their continuing involvement in the regulatory scheme"). Petitioners are objecting because their religion views such conduct as prohibited encouragement or facilitation.

At other times, courts proceed, not by recharacterizing the religious obligations whose violation is coerced, but by deeming those obligations "de minimis" or inconsequential. *See Catholic Health Care System v. Burwell*, No. 14-427-CV, 2015 WL 4665049, at *10 (2d Cir. Aug. 7, 2015) (describing the accommodation as a "de minimis burden of notification"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014) (concluding that the mandate only requires sending a single sheet of paper and thus that the mandate "imposes a *de minimis* requirement on any eligible organization"); *Geneva Coll. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) (deeming the asserted burden insubstantial based on a "qualitative assessment" of how the regulation "imposes on the appellees' exercise of religion").

Departing from both of those approaches, five circuit judges would find a substantial burden. They reject their colleagues' reasoning as amounting to a second-guessing of religious convictions that cannot be reconciled with *Hobby Lobby*. *See Priests for Life*, No.

13-5368, slip op. 11 (May 20, 2015) (Brown, J., dissenting from denial of reh'g en banc, joined by Henderson, J.) (stating that no "law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief"); *id.*, slip op. 8, (Kavanaugh, J., dissenting from denial of reh'g en banc) (same); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627-28 (7th Cir. 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340-41 (11th Cir. 2014) (Pryor, J., concurring) (same). And district judges have likewise disagreed with each other about that approach. *See, e.g.*, *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 747 (S.D. Tex. 2013) (Rosenthal, J.) ("Several district courts have already issued opinions, with inconsistent results.").

Dissenting in part below, Judge Baldock also gave a nod to the understanding that "the accommodation scheme substantially burdens any religious nonprofit that objects to performing an act that would cause or otherwise make it complicit in providing contraceptive coverage simply because the scheme uses substantial fines to compel an act that the nonprofit sincerely believes would have that effect." Pet. App. 124a-25a. Judge Baldock did not endorse the contrary reasoning of the panel majority, but instead simply accepted it "for argument's sake," to "highlight an even deeper problem lurking within the self-insured accommodation scheme." Pet. App. 122a, 125a. Specifically, even under the majority's articulation of the substantial-burden test, many self-insured employers do "cause the provision and receipt of objected-to coverage" by participating in the Executive's so-called accommoda-

tion. Pet. App. 126a. Judge Baldock did not fully explain why similar logic does not apply for the "insured plaintiffs" as well, in that they, too, are required by mandate to provide plans that inexorably give rise to coverage obligations.

In short, the lower courts' approaches to applying *Hobby Lobby*'s substantial-burden holding, now that the Executive is relying on the alternative method of mandate compliance, has led to substantial confusion. The question has sufficiently percolated in the lower courts, yielding a variety of approaches expressed in lengthy opinions. Delay will not yield clarity or more developed arguments. The Court should now grant review to provide a nationwide answer to the question.

II. The Costs Of Delay Are Significant Because Religious Adherents, Not Courts, Should Decide Whether Conduct Coerced By Governmental Mandates Conflicts With Sincerely Held Religious Beliefs.

The Court should grant review to underscore the proper standard under RFRA for finding a substantial burden on religious exercise, and it is important to do so now given the demonstrated effects of deviating from this Court's approach in *Hobby Lobby*.

A. The Improper Substantial-Burden Test Applied Below Adjudicates The Merits Of Adherents' Religious Beliefs.

1. Religious faith and tolerance played a tremendous role in the settlement of the colonies and the founding of the United States. *See, e.g., Town of*

Greece v. Galloway, 134 S. Ct. 1811, 1823-24 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012). This country has a long tradition of governing so as to meaningfully protect the free exercise of religion. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523-24 (1993) (noting "the Nation's essential commitment to religious freedom"). By allowing religious adherents exceptions that are equal to other religious and secular exceptions from regulation, our governments respect diverse faiths and govern by making compromises that avoid unnecessary friction between faith and law.

The Executive, however, resists providing the religious believers here the exemption already accorded to their fellow believers operating as a church. Indeed, the exclusion that the Executive refuses to petitioners is narrower than the exclusion of other employers for secular, administrative reasons. Yet the Executive contends that this decision does not substantially burden religious exercise and therefore does not even require scrutiny under RFRA.

Despite this Court's instructions in *Hobby Lobby*, a number of federal courts have now accepted the Executive's invitation to assess the force of a religious conviction. That approach intrudes upon the dignity of adherents' convictions about profound religious concepts involving facilitation or complicity. It subjects those beliefs to judicial review, as if courts are well situated to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion, as opposed to the substantiality of the governmental burden on that religious exercise. That is not

the inquiry required by RFRA, a bipartisan enactment reflecting the spirit of religious tolerance that this country holds dear.[3]

2. In determining whether a RFRA substantial burden exists, courts have not been permitted to assess the validity of a religious prohibition against particular conduct. That determination is for adherents of the religion. Under RFRA's substantial-burden analysis, courts should instead address (1) whether the religious belief that one must act or refrain from acting in a given way is sincere, and (2) whether the challenged governmental action creates substantial coercion to act contrary to that religious conviction.

As this Court explained in *Hobby Lobby*, federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." 134 S. Ct. at 2778. But that is what the court of appeals' analysis here does. *See, e.g.*, Pet. App. 48a (disagreeing with petitioners' religious objection that "the administrative tasks required to opt out

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[3] The House and Senate approved RFRA in an almost unanimous vote. 130 Cong. Rec. S14,471 (Oct. 27, 1993); 139 Cong. Rec. H2363 (May 11, 1993); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-11 n.9 (1994) (describing RFRA's bipartisan support).

of the Mandate make them complicit in the overall delivery scheme," and concluding instead that the accommodation "relieves them from complicity"); Pet. App. 48a-49a (concluding that "shifting legal responsibility . . . relieves rather than burdens their religious exercise"); Pet. App. 62a-63a ("disagree[ing]" with petitioners' objection that the accommodation scheme "makes them complicit in the larger delivery scheme"); Pet. App. 64a ("The regulations do not burden the religious exercise of employers using insured plans."); Pet. App. 85a (deeming petitioners' religious objection to the regulations on complicity grounds "unconvincing").

Time and again, this Court has refused to question the boundaries, importance, or validity of a person's religious beliefs. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say that [petitioners'] religious beliefs are mistaken or insubstantial."); *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S.

440, 450 (1969) (noting that courts lack authority to decide "the interpretation of particular church doctrines and the importance of those doctrines to the religion").

There is no dispute about the sincerity of petitioners' conviction. *See* Pet. App. 55a & n.24. There is also no dispute about the religious nature of their objection to their "continuing involvement in the regulatory scheme." Pet. App. 58a. Nor is there any doubt that the penalty for failing to comply would be severe. *See* Pet. App. 35a; *see also* 26 U.S.C. § 4980D (imposing a penalty of $100 per day per affected individual); 26 U.S.C. § 4980H (imposing a penalty of $2000 per year per full-time employee). Nevertheless, the court found petitioners' sincerely held religious belief "unconvincing." Pet. App. 85a ("They wish to play no part in it. We find this argument unconvincing . . . ."). But the persuasiveness of that religious view about how petitioners must conduct their affairs is not for the courts to decide.

3. Even if courts could check for the reasonableness of an adherent's religious conviction about complicity or facilitation, the court of appeals' application of that test in this case is problematic. The court effectively second-guessed petitioners' religious objections by finding that coercion to take a particular course of conduct does not pressure petitioners into violating their religious beliefs. Pet. App. 85a-95a.

The court below noted that for both insured and self-insured employers, "the ACA [combined with the regulations] requires that group health plans cover contraceptive services, and a plaintiff knows coverage

will be provided when it opts out." Pet. App. 72a. "When an organization takes advantage of the accommodation, the ACA requires health insurers to provide [administratively mandated contraception] coverage for *insured* group health plans." Pet. App. 33a (emphasis added). Although the Tenth Circuit tries to characterize the insurer's obligation as "independent" of the employer, *see* Pet. App. 64a, the insurer's obligation arises only because the religious nonprofit employer has acted (pursuant to mandate) to retain that insurer, Pet. App. 19a-20a, and then further comply with the mandate through its "accommodation" option. Even then, the insurer's obligation is inextricably linked to the employer because contraceptive coverage is limited to "plan participants and beneficiaries for so long as they remain enrolled in the plan." Pet. App. 60a-61a.

When a religious nonprofit with *a self-insured plan* objects to providing contraceptive coverage to its employees, the plan's third-party administrator (TPA) "is notified that . . . it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. The TPA is authorized and obligated to provide the coverage guaranteed by the ACA *only if* the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it." Pet. App. 67a (citations omitted) (emphasis added). Again, the TPA's obligation arises only because the employer has acted, pursuant to mandate, to provide the insurance. And the document required under the "accommodation" option for mandate compliance "shall be an instrument under which the plan is operated, shall be treated as a designation [by the religious employer] of

the third party administrator as the plan administrator . . . for [the products], and shall supersede any earlier designation." Pet. App. 233a; *see* Pet. App. 261a (Form 700 stating its legal effect as "an instrument under which the plan is operated").

Even under this "accommodation" means of mandate compliance, then, it is an employer's mandated act of offering a plan coupled with the document required of objectors that generates the legal obligation and authority to pay for contraception. The insurer or third-party administrator becomes responsible for providing contraceptive coverage only when the religious nonprofit employer has a mandated "insured" plan or "self-insured" plan and has complied with the so-called accommodation. *See* Pet. App. 29a-33a.

The court of appeals understood that the religious organizations here perceive a religious obligation against providing health insurance that will trigger, encourage, or otherwise facilitate the provision of objected-to drugs to their employees. *See, e.g.*, Pet. App. 58a-60a. That obligation is founded on religious views about facilitation or encouragement of what is deemed objectionable conduct, not on legal distinctions about whether the payments are made through a plan's infrastructure or pursuant to some other duty that applies only because the employer hired a given issuer or administrator. Nonetheless, the court of appeals concluded that the religious employers' anti-facilitation principle is "unconvincing." Pet. App. 85a. Although petitioners' principle rests on *religious* judgments, the court offered only *legal* distinctions immaterial to that religious view.

First, the court concluded that the accommodation scheme was designed "to ensure that Plaintiffs are *not* complicit" in providing contraception. Pet. App. 86a. But bureaucratic purpose cannot dictate religious belief. In any event, that design of the accommodation is cancelled out by its purpose to "ensure[] plan participants and beneficiaries will receive the contraceptive coverage" via the employer's contracted insurer or TPA. Pet. App. 68a. That forced facilitation of contraceptive coverage is central to the religious nonprofits' objection.

Second, the court held that petitioners' religious objection is "not a sufficient predicate for a RFRA claim" because it is based on an "erroneous view" of the contraceptive mandate's regulatory scheme. Pet. App. 86a. But, as the court itself described, the regulatory scheme requires petitioners to provide group health plans that result in the objected-to coverage through the administrative apparatus of those plans.

Third, the court decided that the accommodation scheme imposed only "*de minimis* administrative tasks" that do not amount to a substantial burden. Pet. App. 88a. But that confuses the substantiality question. The burden on religious exercise is the financial liability coercing compliance with the mandate. And nobody questions that the financial coercion is substantial.

Three basic points should resolve the burden issue:

- The employers hold a sincere "religious belief that they may not provide, pay for, or facilitate contraceptive coverage." Pet. App. 58a.

- The employers are mandated to provide insurance plans that are a prerequisite to petitioners' contractors having to cover the relevant drugs. *See* Pet. App. 19a-20a (employer-sponsored group health plans must cover "the full range of FDA-approved contraceptive services").

- An employer that wants to follow the dictates of conscience by not providing that link faces draconian penalties. Pet. App. 34a-35a.

That is enough to trigger Congress's requirement that such regulatory schemes receive scrutiny to ensure they appropriately account for those sincere religious beliefs.

Of course, not all religious believers will conclude that their conduct in directly causing coverage for contraceptives makes the believers complicit in those drugs' use or consequences. But petitioners here do hold that sincere religious belief, and it does not rest on a legal mistake about the regulatory scheme.

4. *Hobby Lobby* should thus resolve the substantial-burden inquiry. Indeed, the court of appeals recognized that the violation in *Hobby Lobby* arose because the plaintiffs were put to the choice of either complying with the contraceptive mandate, which violated their religious convictions, or "not complying

and paying significant penalties." Pet. App. 18a. The court further recognized that "substantiality does not permit us to scrutinize the 'theological merit' of a plaintiff's religious beliefs—instead, we analyze 'the intensity of the coercion applied by the government to act contrary to those beliefs.'" Pet. App. 55a (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)). But simply asserting that an employer's provision of insurance is "independent" from the relevant coverage obligations (Pet. App. 64a, 84a-87a) does not make it so. And courts have no place judging whether the degree of attenuation presents meaningful religious concerns for those who must comply with the mandate.

The court of appeals' finding of "independen[ce]" cannot trump religious adherents' beliefs regarding participation and facilitation. *Cf.* Pet. App. 63a-65a. Just as a court must respect a religious adherent's view that manufacturing sheet metal is permissible while manufacturing tank turrets makes him too complicit in wrongdoing, *Thomas*, 450 U.S. at 715, the court of appeals' own view of how much separation is enough is of no relevance here. *Hobby Lobby*, 134 S. Ct. at 2779.

B. The Federal Executive's Regulatory Overreach Intrudes On Religious Liberty.

The Executive Branch's contraceptive mandate is the latest example of an attempted aggrandizement of agency authority. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (unanimously rejecting EEOC's suit against a church for its decisions about employment of a com-

missioned minister, and dismissing EEOC's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (rejecting EPA's interpretation of the Clean Air Act to authorize rewriting statutory thresholds for greenhouse-gas emissions in part "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

The Executive's refusal to exempt objecting religious employers from the contraceptive mandate—a mandate that already excludes churches, small employers, and employers with grandfathered plans—is difficult to square with an attitude of respectful accommodation of religious exercise. This is particularly true in light of the government's position that its regulatory objective would not even be accomplished by forcing the Little Sisters (and other co-petitioners with self-insured church plans) to comply with the accommodation scheme. *See* Pet. 20; *see also* Pet. App. 79a-81a. Nonetheless, the coercion to comply is severe. Pet. App. 34a-35a. RFRA was meant to require at least *scrutiny* of a religious adherent's claim for an exemption from such a scheme.

C. Exempting Religious Nonprofits Would Afford Them Equal Treatment With Like Adherents.

Most churches, small employers, and employers with grandfathered plans are not covered by the Executive's contraceptive mandate. There is no reason to

think that the Executive could not in like manner exempt religious nonprofits who identify themselves as having the same religious objection that animates the exemption for churches.

The fact that the government already excludes so many employers from the coverage mandate is strong evidence that the government can further its interests here with means less that are restrictive of religious liberty. The Executive cannot suggest that adherents' religious convictions differ when they meet on Sunday to determine insurance arrangements for employees of their church and when they meet on Monday to determine insurance arrangements for employees of a church-affiliated charity or school. In the former scenario, the Executive has determined that methods other than the mandate will meet its interest in promoting access to contraceptives while respecting religious employers' beliefs. By necessity, those same methods will achieve the government's interest while respecting other religious employers' beliefs.

And the Executive has not seriously attempted to show that its alternative form of compliance with the mandate—what it calls an "accommodation"—is the method least restrictive of religious exercise for achieving a compelling governmental interest. Rather than focusing on interests framed broadly, RFRA demands "a more focused inquiry" on "application of the challenged law to the person." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted); *see id.* at 2779-80 (assuming the existence of "compelling" interests framed broadly but requiring a focus on the governmental interest in the mandate to petitioners).

That focus is on conscripting *these religious employers* into the government's regulatory scheme.

Such conscription cannot be the means least restrictive of religious exercise for achieving a compelling governmental interest given the existing carve-outs for numerous employers, on grounds both secular and religious. Rather than coercing employers into violating their religious beliefs, the Executive can rely on the methods it has already found acceptable with regard to employers not subject to the mandate. Those methods may be providing coverage via the government's health exchanges, providing a tax subsidy or refund, or directly subsidizing the contraception at participating pharmacies. *See generally id.* at 2781 n.37.

D. Religious Nonprofits Are A Vital Thread In States' Social Fabric And Should Be Given Latitude To Operate In Accordance With Their Animating Religious Beliefs.

The Executive's refusal to equally exclude all religious objectors from the contraceptive mandate betrays a lack of proper concern for federal law that protects religious liberty. Religious charities, schools, and other nonprofits feel that burden heavily. *See id.* at 2785 (Kennedy, J., concurring) ("For those who choose [to believe in a divine creator], free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.").

The host of religious objectors to the contraceptive mandate include theological seminaries, schools and

colleges, orders of nuns, and charities caring for indigent elderly and orphans. They have avowedly religious missions, and their missions are part of what drives them to operate with a motive not to profit, but to contribute to societies across the nation in their own unique ways. The heavy religious burden that the Executive's mandate imposes on nonprofits faithfully serving their communities may well detract from the vigor with which they serve and even their willingness to serve at all. The *amici* States thus respectfully urge that the Court pay close attention to the important interests of these vital institutions.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

"STATE RFRA" PROVISIONS

- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: 2015 SB 975, enacted April 2, 2015
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. § 761.01 et seq.
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. § 35/1 et seq.
- Indiana: 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015
- Kansas: Kan. Stat. § 60-5301 et seq.
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Rev. Stat. § 13:5231 et seq.
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. § 28-22-1 et seq.
- Oklahoma: Okla. Stat. tit. 51, § 251 et seq.
- Pennsylvania: 71 Pa. Stat. § 2403
- Rhode Island: R.I. Gen. Laws § 42-80.1-1 et seq.
- South Carolina: S.C. Code § 1-32-10 et seq.
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code § 110.001 et seq.
- Virginia: Va. Code § 57-1 et seq.

Nos. 15-105 and 15-119

In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

Under federal law, health insurers and employer-sponsored group health plans generally must cover certain preventive health services, including contraceptive services prescribed for women by their doctors. Petitioners object to providing contraceptive coverage on religious grounds and are eligible for a regulatory accommodation that would allow them to opt out of the contraceptive-coverage requirement. Petitioners contend, however, that the accommodation itself violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, by requiring or encouraging third parties to provide their employees with separate contraceptive coverage after petitioners opt out. The questions presented are:

1. Whether RFRA entitles petitioners not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from arranging for third parties to provide separate coverage to the affected women.

2. Whether the accommodation regulations violate the Establishment Clause.

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In the Supreme Court of the United States

No. 15-105

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

No. 15-119

SOUTHERN NAZARENE UNIVERSITY, ET AL., PETITIONERS

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-149a)[1] is reported at 794 F.3d 1151. The order of the district court denying a preliminary injunction to some of the petitioners in No. 15-105 (Pet. App. 152a-189a) is reported at 6 F. Supp. 3d 1225. The order of a

[1] Unless otherwise noted, citations to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 15-105.

different district court granting a preliminary injunction to the remaining petitioners in No. 15-105 (Pet. App. 190a-210a) is not published in the *Federal Supplement* but is available at 2013 WL 6804259. The order of the district court granting a preliminary injunction in No. 15-119 (No. 15-119 Pet. App. 156a-184a) is not published in the *Federal Supplement* but is available at 2013 WL 6804265.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2015. The petitions for writs of certiorari were filed on July 23, 2015, and July 24, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Patient Protection and Affordable Care Act (Affordable Care Act or Act), Pub. L. No. 111-148, 124 Stat. 119,[2] seeks to ensure universal access to quality, affordable health coverage. Some of the Act's provisions make insurance available to people who previously could not afford it. See *King* v. *Burwell*, 135 S. Ct. 2480, 2485-2487 (2015). Other reforms seek to improve the quality of coverage for all Americans, including the roughly 150 million people who continue to rely on employer-sponsored group health plans. See, *e.g.*, 42 U.S.C. 300gg-11 to 300gg-19a.[3]

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[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[3] See Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2014 Annual Survey* 56 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report (*Health Benefits Survey*).

One of the Act's reforms requires insurers and employer-sponsored group health plans to cover immunizations, screenings, and other preventive services without imposing copayments, deductibles, or other cost-sharing requirements. 42 U.S.C. 300gg-13. Congress determined that broader and more consistent use of preventive services is critical to improving public health and that people are more likely to obtain appropriate preventive care when they do not have to pay for it out of pocket. 78 Fed. Reg. 39,872 (July 2, 2013); see *Priests for Life* v. *HHS*, 772 F.3d 229, 259-260 (D.C. Cir. 2014) (*PFL*), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

The Act specifies that the preventive services to be covered without cost-sharing include "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA), a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4); see *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (*Hobby Lobby*). Congress included a specific provision for women's health services "to remedy the problem that women were paying significantly more out of pocket for preventive care and thus often failed to seek preventive services." *PFL*, 772 F.3d at 235; see *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring).

In identifying the women's preventive services to be covered, HRSA relied on recommendations from independent experts at the Institute of Medicine (IOM). *Hobby Lobby*, 134 S. Ct. at 2762. IOM recommended including the full range of contraceptive methods approved by the Food and Drug Administra-

tion (FDA), which IOM found can greatly decrease the risk of unintended pregnancies, adverse pregnancy outcomes, and other negative health consequences for women and children. IOM, *Clinical Preventive Services for Women: Closing the Gaps* 10, 109-110 (2011) (*IOM Report*). IOM also noted that "[c]ontraceptive coverage has become standard practice for most private insurance and federally funded insurance programs" and that "health care professional associations"—including the American Medical Association and the American Academy of Pediatrics—"recommend the use of family planning services as part of preventive care for women." *Id.* at 104, 108.

Consistent with IOM's recommendation, the HRSA guidelines include all FDA-approved contraceptive methods, as prescribed by a doctor or other health care provider. 77 Fed. Reg. 8725 (Feb. 15, 2012); see *Hobby Lobby*, 134 S. Ct. at 2762. Accordingly, the regulations adopted by the three Departments responsible for implementing the relevant provisions of the Affordable Care Act (HHS, Labor, and the Treasury) include those contraceptive methods among the preventive services that insurers and employer-sponsored group health plans must cover without cost-sharing. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury).[4]

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[4] Under the Act's grandfathering provision, health plans that have not made specified changes since the Act's enactment are exempt from many of the Act's reforms, including the requirement to cover preventive services. *Hobby Lobby*, 134 S. Ct. at 2763-2764; see 42 U.S.C. 18011. The percentage of employees in grandfathered plans is "quickly phasing down," *PFL*, 772 F.3d at 266

2. "'[C]hurches, their integrated auxiliaries, and conventions or associations of churches,' as well as 'the exclusively religious activities of any religious order,'" are exempt from the contraceptive-coverage requirement under a regulation that incorporates a longstanding definition from the Internal Revenue Code. *Hobby Lobby*, 134 S. Ct. at 2763 (quoting 26 U.S.C. 6033(a)(3)(A) and citing 45 C.F.R. 147.131(a)). In addition, recognizing that some other employers have religious objections to providing contraceptive coverage, the Departments developed "a system that seeks to respect the religious liberty" of such employers "while ensuring that the employees of these entities have precisely the same access to all FDA-approved contraceptives" as other women. *Id.* at 2759; see 77 Fed. Reg. 16,503 (Mar. 21, 2012). That regulatory accommodation is available to any nonprofit organization that holds itself out as a religious organization and that opposes covering some or all of the required contraceptive services on religious grounds. 45 C.F.R. 147.131(b). In light of this Court's decision in *Hobby Lobby*, the Departments have also extended the same accommodation to closely held for-profit entities that object to providing contraceptive coverage based on their owners' religious beliefs. 80 Fed. Reg. 41,324-41,330, 41,346 (July 14, 2015) (to be codified at 45 C.F.R. 147.131(b)(2)(ii)).

a. The accommodation allows objecting employers to opt out of any obligation to provide contraceptive coverage and instead requires third parties to make separate payments for contraceptive services on behalf of employees (and their covered dependents) who

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n.25, having dropped from 56% in 2011 to 26% in 2014. *Health Benefits Survey* 7, 210.

choose to use those services. 78 Fed. Reg. at 39,875-39,880.

If the employer invoking the accommodation has an insured plan—that is, if it purchases coverage from a health insurance issuer such as BlueCross BlueShield—then the obligation to provide separate coverage falls on the insurer. The insurer must "exclude contraceptive coverage from the employer's plan and provide separate payments for contraceptive services for plan participants without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763; see 45 C.F.R. 147.131(c).

Rather than purchasing coverage from an insurer, some employers "self-insure" by paying employee health claims themselves. Self-insured employers typically hire an insurance company or other outside entity to serve as a third-party administrator (TPA) responsible for processing claims and performing other administrative tasks. 78 Fed. Reg. at 39,879-39,880 & n.40. If a self-insured employer invokes the accommodation, its TPA "must 'provide or arrange payments for contraceptive services' for the organization's employees without imposing any cost-sharing requirements on the eligible organization, its insurance plan, or its employee beneficiaries." *Hobby Lobby*, 134 S. Ct. at 2763 n.8 (quoting 78 Fed. Reg. at 39,893); see 29 C.F.R. 2590.715-2713A(b)(2). The TPA may then obtain compensation for providing the required coverage through a reduction in fees paid by insurers to participate in the federally-facilitated insurance exchanges created under the Affordable Care Act. *Hobby Lobby*, 134 S. Ct. at 2763 n.8.

The accommodation operates differently if a self-insured organization has a "church plan" as defined in 29 U.S.C. 1002(33). Church plans are generally exempt from regulation under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* See 29 U.S.C. 1003(b)(2). The government's authority to require a TPA to provide coverage under the accommodation derives from ERISA. See 29 C.F.R. 2510.3-16(b); 80 Fed. Reg. at 41,323. Accordingly, if an eligible organization with a self-insured church plan invokes the accommodation, its TPA is not legally required to provide separate contraceptive coverage to the organization's employees, but the government will reimburse the TPA if it provides coverage voluntarily. 79 Fed. Reg. 51,095 n.8 (Aug. 27, 2014).

In all cases, an employer that opts out under the accommodation has no obligation "to contract, arrange, pay, or refer for contraceptive coverage" to which it has religious objections. 78 Fed. Reg. at 39,874. The employer also need not inform plan participants of the separate coverage provided by third parties. Instead, insurers and TPAs must provide such notice themselves, must do so "separate from" materials distributed in connection with the employer's group health coverage, and must make clear that the objecting employer plays no role in covering contraceptive services. 29 C.F.R. 2590.715-2713A(d); 45 C.F.R. 147.131(d).[5] The accommodation thus "effec-

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[5] A model notice informs employees that their employer "will not contract, arrange, pay, or refer for contraceptive coverage" and that the issuer or TPA "will provide separate payments for contraceptive services." HHS, *Notice of Availability of Separate Payments for Contraceptive Services*, https://www.cms.gov/CCIIO/

tively exempt[s]" objecting employers from the contraceptive-coverage requirement. *Hobby Lobby*, 134 S. Ct. at 2763.

b. The original accommodation regulations provided that an eligible employer could invoke the accommodation, and thereby opt out of the contraceptive-coverage requirement, by "self-certify[ing]" its eligibility using a form provided by the Department of Labor and transmitting that form to its insurer or TPA. *Hobby Lobby*, 134 S. Ct. at 2782; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(A); 45 C.F.R. 147.131(c)(1)(i). In light of this Court's interim order in *Wheaton College* v. *Burwell*, 134 S. Ct. 2806 (2014) (*Wheaton*), the Departments have also made available an alternative procedure for invoking the accommodation.

In *Wheaton*, the Court granted an injunction pending appeal to Wheaton College, which had challenged the accommodation under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* As a condition for injunctive relief, the Court required Wheaton to inform HHS in writing that it satisfied the requirements for the accommodation. *Wheaton*, 134 S. Ct. at 2807. The Court provided that Wheaton "need not use the form prescribed by the Government" and "need not send copies to health insurance issuers or [TPAs]." *Ibid.* At the same time, the Court specified that "[n]othing in [its] order preclude[d] the Government from relying on" Wheaton's written notice "to facilitate the provision of full contraceptive coverage under the Act" by requiring Wheaton's insurers and TPAs to provide that coverage separately. *Ibid.* The government was able to do

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Resources/Forms-Reports-and-Other-Resources/Downloads/cms-10459-enrollee-notice.pdf (last visited Sept. 30, 2015).

so because, as the Court was aware, Wheaton had identified its insurers and TPAs in the course of the litigation. *Id.* at 2815 (Sotomayor, J., dissenting).

In light of this Court's interim order in *Wheaton*, the Departments augmented the accommodation to provide all eligible employers with an option essentially equivalent to the one made available to Wheaton. The regulations allow an eligible employer to opt out by notifying HHS of its objection rather than by sending the self-certification form to its insurer or TPA. 79 Fed. Reg. at 51,092. The employer need not use any particular form and need only indicate the basis on which it qualifies for the accommodation, as well as the type of plan it offers and contact information for the plan's insurers and TPAs. *Id.* at 51,094-51,095; see 29 C.F.R. 2590.715-2713A(b)(1)(ii)(B) and (c)(1); 45 C.F.R. 147.131(c)(1)(ii). If an employer opts out using this alternative procedure, HHS and the Department of Labor notify its issuers and TPAs of their obligation to provide separate contraceptive coverage. *Ibid.*

3. Petitioners are nonprofit religious organizations that provide or arrange health coverage for their employees and students. Petitioners object to covering some or all contraceptive services and are eligible to opt out of the contraceptive-coverage requirement under the accommodation.

a. The petitioners in No. 15-105 (collectively, the Little Sisters petitioners) are two groups of organizations. The first group consists of two nonprofit nursing homes affiliated with the Little Sisters of the Poor, an order of Catholic nuns that provides care for the elderly poor (collectively, the Little Sisters); the Christian Brothers Employee Benefit Trust (Christian Brothers Trust), an ERISA-exempt self-insured

church plan that provides health coverage to the Little Sisters' employees; and Christian Brothers Services, the plan's TPA. Pet. App. 14a, 34a. The second group consists of Reaching Souls, a nonprofit organization that trains pastors and provides care to orphans; Truett-McConnell College, a nonprofit religious college; and GuideStone Financial Resources, which maintains an ERISA-exempt self-insured church plan that provides coverage to individuals employed by Reaching Souls, Truett-McConnell, and other organizations. *Id.* at 14a-15a, 37a.

b. The petitioners in No. 15-119 are four nonprofit religious colleges and universities: Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid-America Christian University (collectively, the Southern Nazarene petitioners). The Southern Nazarene petitioners provide or arrange health coverage for their employees and students through a variety of different coverage arrangements. Pet. App. 14a, 35a-36a.

4. Petitioners filed three separate suits challenging the accommodation under RFRA and on other grounds. RFRA provides that the government may not "substantially burden a person's exercise of religion" unless that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1. A district court denied a preliminary injunction in the suit brought by the Little Sisters, the Christian Brothers Trust, and Christian Brothers Services. Pet. App. 162a-189a.[6] A

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[6] After the Tenth Circuit denied an injunction pending appeal, this Court granted interim injunctive relief conditioned on the provision of written notice to HHS that the Little Sisters satisfy

different district court granted preliminary injunctions in the two suits brought by the remaining petitioners. *Id.* at 190a-210a; 15-119 Pet. App. 156a-184a.

5. The court of appeals consolidated appeals from the three orders and held that petitioners are not entitled to preliminary injunctive relief because their claims are unlikely to succeed on the merits. Pet. App. 2a-149a.

a. As relevant here, the court of appeals first held that the accommodation does not substantially burden the exercise of religion under RFRA. Pet. App. 42a-95a. The court began by highlighting the unusual nature of petitioners' claim, "which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law." *Id.* at 42a-43a. The court emphasized that, under the accommodation, "the act of opting out * * * excuses [objecting employers] from participating in the provision of contraceptive coverage" and ensures that they do not "provide, pay for, or otherwise facilitate that coverage." *Id.* at 60a. Instead, the accommodation transfers those obligations to third parties—an approach that is "typical of religious objection accommodations that shift responsibility to non-objecting entities * * * after an objector declines to perform a task on religious grounds." *Id.* at 68a-69a; see *id.* at 69a n.31 (collecting examples).

The court of appeals emphasized that it was not questioning the sincerity or the "theological merit" of petitioners' religious objections to the accommodation. Pet. App. 55a (citation omitted); see *id.* at 86a-87a &

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the eligibility requirements for the accommodation. Pet. App. 150a-151a.

n.46. But it explained that the question whether a regulation imposes a substantial burden cognizable under RFRA is a question of law that must be resolved by the court, not a question of fact controlled by the challenger's sincere religious beliefs. *Id.* at 43a-56a. After carefully analyzing petitioners' challenges to the accommodation, the court concluded that petitioners had failed to establish the existence of a substantial burden because their challenges either rested on errors about how the accommodation operates or focused on the government's arrangements with third parties rather than any burdens imposed on petitioners themselves. *Id.* at 63a-95a. The court explained that although petitioners "sincerely oppose contraception, * * * their religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled" under federal law. *Id.* at 91a.

b. The court of appeals next rejected the Little Sisters petitioners' contention that the contraceptive-coverage regulations violate the Establishment Clause by providing an automatic exemption for houses of worship and an opt-out accommodation for other religious nonprofit organizations. Pet. App. 104a-111a. The court explained that the regulations incorporate a "longstanding and familiar" distinction that applies in a variety of contexts in the Internal Revenue Code. *Id.* at 104a (quoting *PFL*, 772 F.3d at 238). The court emphasized that the regulations rely on "'neutral, objective criteria,'" and it noted that the Little Sisters petitioners had "cite[d] no case holding that [such] organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause." *Id.* at 108a-109a (citation omitted).

c. Judge Baldock dissented in part. Pet. App. 122a-149a. He agreed with the majority that the accommodation does not impose a substantial burden on employers with insured plans. *Id.* at 122a. He reasoned that insurers are already required by the Affordable Care Act to provide contraceptive coverage, and that when an employer with an insured plan opts out under the accommodation the only result is to absolve the employer of any role in providing the required coverage. *Id.* at 127a-128a. With respect to self-insured employers, however, Judge Baldock concluded that the accommodation imposes a substantial burden because the government responds to the employer's opt-out by requiring (or, in the case of an ERISA-exempt church plan, encouraging) the relevant TPA to provide coverage in the employer's stead. *Id.* at 128a-146a.

Judge Baldock concluded that the Little Sisters, which have a self-insured church plan, were not entitled to preliminary injunctive relief because of an unusual factual circumstance: The primary TPA for the Little Sisters' health plan, Christian Brothers Services, had "promised not to provide contraceptive coverage even if [the] Little Sisters opt[] out" under the accommodation (indeed, Christian Brothers Services joined the Little Sisters' RFRA challenge). Pet. App. 145a; see *id.* at 14a. Judge Baldock therefore concluded that the Little Sisters had not established a substantial burden because it appeared that their employees would not receive contraceptive coverage even if they opted out. *Id.* at 145a.

6. The court of appeals sua sponte called a poll to consider rehearing en banc, which was denied. Judge Hartz, joined by Judges Kelly, Tymkovich, Gorsuch,

and Holmes, dissented from the denial of rehearing en banc. 2015 WL 5166807. In Judge Hartz's view, the court should have treated petitioners' sincere religious objection to opting out under the accommodation as dispositive of the substantial-burden inquiry. *Id.* at *1. But he emphasized that "[r]esolution of the substantial-burden question does not * * * resolve this litigation," and he would have returned the case to the panel to allow it to determine whether the accommodation qualifies as the least restrictive means of furthering a compelling government interest. *Id.* at *2.

ARGUMENT

Petitioners principally contend that RFRA entitles objecting employers not only to opt out of providing contraceptive coverage themselves, but also to prevent the government from eliminating the resulting harm to their female employees and beneficiaries by arranging for third parties to provide those women with separate coverage. The court of appeals correctly rejected that argument, joining six of its sister circuits in holding that the accommodation is consistent with RFRA and with this Court's decision in *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). But the Eighth Circuit recently reached the opposite conclusion, creating a circuit conflict on an important question of federal law that should be resolved by this Court. That question is presented in a total of seven pending petitions for writs of certiorari. In the government's view, the most suitable vehicle for resolving it is *Roman Catholic Archbishop of Washington* v. *Burwell*, No. 14-1505 (filed June 19,

2015) (*RCAW*).[7] These petitions should therefore be held pending the disposition of the petition in *RCAW* and, if that petition is granted, the Court's decision in that case. The Little Sisters petitioners' separate contention that the accommodation regulations violate the Establishment Clause is without merit and has been uniformly rejected by the courts of appeals. Further review of that question is thus unwarranted regardless of the disposition of the *RCAW* petition.

1. This Court should resolve the circuit conflict over the viability of RFRA challenges to the accommodation, but the pending petition in *RCAW* is a more suitable vehicle in which to do so.

a. The accommodation exempts religious objectors from the generally applicable requirement to provide contraceptive coverage, while also seeking to ensure that third parties separately provide the affected women with the coverage to which those women are legally entitled. In our pluralistic society, that sort of substitution of obligations is an appropriate means of accommodating religious objectors while also protecting other important interests, such as women's interest in full and equal health coverage. The court of appeals correctly held that notwithstanding petitioners' sincere religious objections to contraceptive coverage, such an accommodation does not impose a substantial burden cognizable under RFRA. As the court explained, "RFRA does not prevent the Government from reassigning obligations after an objector opts out

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[7] The other petitions presenting the question are *Geneva College* v. *Burwell*, No. 15-191 (filed Aug. 11, 2015); *East Texas Baptist University* v. *Burwell*, No. 15-35 (filed July 8, 2015); *Priests for Life* v. *HHS*, No. 14-1453 (filed June 9, 2015); and *Zubik* v. *Burwell*, No. 14-1418 (filed May 29, 2015).

simply because the objector strongly opposes the ultimate goal of the generally applicable law" from which it has been exempted. Pet. App. 91a.

For the reasons set forth in the government's briefs in opposition to the other pending petitions presenting materially identical arguments, petitioners' challenges to the court of appeals' substantial-burden analysis lack merit. As those briefs further demonstrate, the accommodation would in any event survive RFRA scrutiny because it is the least restrictive means of furthering compelling government interests, including "the Government's compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee." *Hobby Lobby*, 134 S. Ct. at 2785-2786 (Kennedy, J., concurring); see *id.* at 2799-2800 & n.23 (Ginsburg, J., dissenting).[8]

b. The government previously argued that RFRA challenges to the accommodation did not warrant this Court's review because those challenges had been rejected by every court of appeals to consider them—seven courts in all. See Pet. App. 95a; *Grace Schools* v. *Burwell*, No. 14-1430, 2015 WL 5167841, at *17 (7th Cir. Sept. 4, 2015); *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, No. 13-2723, 2015 WL 4979692, at *12 (6th Cir. Aug. 21, 2015); *Catholic Health Care Sys.* v. *Burwell*, 796 F.3d 207, 226 (2d

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[8] See Br. in Opp. at 10-27, *East Texas Baptist Univ.* v. *Burwell*, No. 15-35 (Sept. 9, 2015); Br. in Opp. at 13-31, *Zubik* v. *Burwell* and *Geneva College* v. *Burwell*, Nos. 14-1418 & 15-191 (Aug. 20, 2015); Br. in Opp. at 13-29, *Priests for Life* v. *HHS* and *Roman Catholic Archbishop of Wash.* v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015).

Cir. 2015); *East Texas Baptist Univ.* v. *Burwell*, 793 F.3d 449, 463 (5th Cir. 2015), petition for cert. pending, No. 15-35 (filed July 8, 2015); *Wheaton College* v. *Burwell*, 791 F.3d 792, 799-801 (7th Cir. 2015); *University of Notre Dame* v. *Burwell*, 786 F.3d 606, 618-619 (7th Cir. 2015); *Geneva College* v. *Secretary HHS*, 778 F.3d 422, 439-440 (3d Cir. 2015), petitions for cert. pending, Nos. 14-1418 and 15-191 (filed May 29 and Aug. 11, 2015); *Priests for Life* v. *HHS*, 772 F.3d 229, 246 (D.C. Cir. 2014), petitions for cert. pending, Nos. 14-1453 and 14-1505 (filed June 9 and 19, 2015).

Recently, however, the Eighth Circuit held that objecting employers' religious opposition to the accommodation is sufficient to establish a substantial burden under RFRA even though that opposition is based on actions that the government and third parties would take in response to the employers' opt-out. *Sharpe Holdings, Inc.* v. *HHS*, No. 14-1507, 2015 WL 5449491, at *8-*9 (Sept. 17, 2015); see *Dordt College* v. *Burwell*, No. 14-2726, 2015 WL 5449504, at *2 (Sept. 17, 2015) (applying *Sharpe Holdings* in a parallel case). The Eighth Circuit further held that—at least on the preliminary-injunction record before it—the accommodation does not qualify as the least restrictive means of furthering a compelling government interest because, in the court's view, the government could provide contraceptive coverage to the affected women by other means. *Sharpe Holdings*, 2015 WL 5449491, at *10-*12.

The Eighth Circuit recognized that its substantial-burden holding conflicted with the decisions of every other court of appeals to consider the issue. *Sharpe Holdings*, 2015 WL 5449491, at *7 & n.11. Its least-restrictive-means holding likewise conflicted with the

D.C. Circuit's conclusion that the accommodation satisfies RFRA scrutiny because it "requires as little as it can from the objectors while still serving the government's compelling interests." *PFL*, 772 F.3d at 237; see *id.* 256-267; see also *University of Notre Dame*, 786 F.3d at 616-618.

The Eighth Circuit's decision thus creates a square circuit conflict on the viability of RFRA challenges to the accommodation—a vital component of Congress's effort to ensure that all Americans have full and equal access to preventive health services. In so doing, moreover, the Eighth Circuit relied on a sweeping and erroneous interpretation of RFRA under which an objection by an employer would effectively dictate the government's independent arrangements with third parties and prevent its female employees and beneficiaries from receiving the full and equal health coverage to which they are entitled under federal law. This Court should therefore grant review in an appropriate vehicle to resolve the circuit conflict and correct the Eighth Circuit's error.

c. As the government has previously explained, the pending petition in *RCAW* appears to be the best available vehicle in which to consider RFRA challenges to the accommodation. See Br. in Opp. at 30-31, *Priests for Life* v. *HHS* and *RCAW* v. *Burwell*, Nos. 14-1453 & 14-1505 (Aug. 12, 2015) (*RCAW* Opp.).

First, the *RCAW* petition presents all of the health coverage arrangements that have given rise to RFRA challenges to the accommodation. *RCAW* Opp. 30. The accommodation operates somewhat differently with respect to insured plans, self-insured plans subject to ERISA, and ERISA-exempt self-insured church plans. See pp. 5-8, *supra*. As Judge Baldock's

partial dissent in this case illustrates, some judges have concluded that those differences are material to the RFRA analysis. Pet. App. 122a; see also, *e.g.*, *Roman Catholic Archbishop of Wash.* v. *Sebelius*, 19 F. Supp. 3d 48, 72-85 (D.D.C. 2013). Accordingly, the Court should grant review in a case that would allow it to resolve the validity of the accommodation as applied to all three plan types. Here, the *Little Sisters* petition (No. 15-105) is not an appropriate vehicle because it includes only parties with ERISA-exempt church plans. Pet. App. 14a-15a, 34a, 37a. In *Southern Nazarene* (No. 15-119), petitioners now state (Pet. 33-34) that they include organizations with insured plans, a self-insured plan, and an ERISA-exempt self-insured church plan.[9] The government has no reason to doubt that statement, but it notes that some of the relevant information is not found in the preliminary-injunction record and was instead provided by the Southern Nazarene petitioners in their appellate briefs.[10] *RCAW*, in contrast, arises from a decision on cross-motions for summary judgment and contains no similar gaps in the record. *PFL*, 772 F.3d at 239-242.

Second, the court of appeals' opinion in *RCAW* not only addressed the substantial-burden issue but also

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[9] The Southern Nazarene petitioners also note (Pet. 34) that they include organizations with student health plans. Courts considering RFRA challenges to the accommodation have not distinguished between student health plans and insured employee health plans, but in any event the *RCAW* petition also includes a student health plan. *PFL*, 772 F.3d at 240.

[10] See Pet. App. 35a n.14 ("The descriptions of Mid-America Christian's insurance arrangements in the record before us are inconsistent."); 14-6026 Gov't C.A. Br. 9 n.3 ("It is not entirely clear from the Joint Stipulation of Facts how Southern Nazarene University's health plan operates.").

held, in the alternative, that the accommodation qualifies as the least-restrictive means of furthering compelling government interests. *RCAW* Opp. 31; see *PFL*, 772 F.3d at 256-267. That would make *RCAW* a more suitable vehicle than this case, where some of the potentially dispositive issues were not addressed by either the panel or the dissenters from the denial of rehearing en banc, who would have returned the case to the panel to consider the application of RFRA scrutiny. 2015 WL 5166807, at *2.

Finally, the *Little Sisters* petition would be an especially unsuitable vehicle because of the unusual and uncertain circumstances of the lead petitioners in that case. The Little Sisters provide coverage to their employees through an ERISA-exempt church plan, and the plan's principal TPA (a co-petitioner in this case) has made clear that it would not provide contraceptive coverage even if the Little Sisters invoked the accommodation. Pet. App. 14a; see *id.* at 145a (Baldock, J., dissenting in part). The Little Sisters petitioners therefore assert (Pet. ii, 2-3, 12, 20-21) that the Court should grant their petition to determine whether the accommodation is consistent with RFRA if the circumstances of a particular employer make clear that its employees and beneficiaries would not receive contraceptive coverage if the employer invoked the accommodation.

Such a circumstance would, if anything, *weaken* any claim that the accommodation imposes a substantial burden. Cf. Pet. App. 145a (Baldock, J., dissenting in part). But the more important point for present purposes is that, as the Little Sisters petitioners acknowledge in a footnote, the factual predicate for their argument is uncertain: In addition to Christian

Brothers Services, the Little Sisters' self-insured church plan apparently also relies on an entity called Express Scripts to administer prescription drug claims. Pet. 12 n.2. It appears that Express Scripts may qualify as a TPA for purposes of the accommodation regulations, and the Little Sisters petitioners state that Express Scripts may be willing to provide contraceptive coverage under the accommodation. *Ibid.* But the preliminary-injunction record contains no information about Express Scripts, and the consequences that would follow if the Little Sisters invoked the accommodation are thus unclear.[11] The Court should decline to take up the question presented in a case in which the petitioners' legal arguments focus in substantial part on such uncertain extra-record facts, and which in any event presents an idiosyncratic fact pattern.

2. The Little Sisters petitioners also briefly renew their contention (Pet. 33-37) that the accommodation regulations violate the Establishment Clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. No further review of that issue is warranted.

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[11] See Pet. App. 145a (Baldock, J., dissenting in part) (declining to address the Little Sisters petitioners' arguments based on Express Scripts because "they have not sufficiently developed this theory"); see also Mem. for Resp. in Opp. at 28-29 & n.7, No. 13A691 (describing the lack of record information regarding Express Scripts in opposing the Little Sisters petitioners' application for an injunction pending appeal); 13-1540 Gov't C.A. Br. 19 n.3 (explaining that the Little Sisters petitioners "made no reference to Express Scripts in their complaint or in their preliminary injunction filings").

Incorporating a definition from a longstanding provision of the Internal Revenue Code, the contraceptive-coverage regulations provide an automatic exemption for "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order." 26 U.S.C. 6033(a)(3)(A); see 45 C.F.R. 147.131(a). That automatic exemption was intended to "respect[] the unique relationship between a house of worship and its employees in ministerial positions," 76 Fed. Reg. 46,623 (Aug. 3, 2011), and it was "provided against the backdrop of the longstanding governmental recognition of a particular sphere of autonomy for houses of worship, such as the special treatment given to those organizations in the Code," 80 Fed. Reg. at 41,325.[12]

The Little Sisters petitioners assert that the Departments violated the Establishment Clause by providing an automatic exemption to houses of worship and an opt-out accommodation to other religious organizations. But houses of worship as defined in the exemption regulation "have long enjoyed advantages (notably tax advantages) over other entities, without these advantages being thought to violate the establishment clause." *PFL*, 772 F.3d at 272 (citation omitted); see Pet. App. 105a (citing examples). The view advanced by the Little Sisters petitioners would call into question other provisions of federal law incorpo-

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[12] Contrary to the Little Sisters petitioners' characterization (Pet. 35-36), therefore, the automatic exemption was "not a mere product of the likelihood that [exempted organizations] hire coreligionists," but rather reflects the "special status" of houses of worship "under longstanding tradition in our society and under federal law." 80 Fed. Reg. at 41,325.

rating that "familiar regulatory distinction between houses of worship and religiously affiliated organizations." *PFL*, 772 F.3d at 272-273.

The Little Sisters petitioners cite no authority supporting their assertion that the Establishment Clause prohibits such neutral, nondiscriminatory distinctions based on organizational form. Their reliance on cases such as *Larson* v. *Valente*, 456 U.S. 228 (1982), is entirely misplaced. See Pet. 34-36. The statute held unconstitutional in *Larson* was "drafted with the explicit intention" of requiring "particular religious denominations" to comply with registration and reporting requirements while excluding other religious denominations. 456 U.S. at 254. *Larson* and similar decisions thus firmly establish that "one religious denomination cannot be officially preferred over another." *Id.* at 244. But they cast no doubt on the validity of the regulations at issue here, which "draw distinctions based on organizational form and purpose, and not religious belief or denomination." *PFL*, 772 F.3d at 273.

The Little Sisters petitioners do not contend that the court of appeals' rejection of their Establishment Clause challenge implicates any circuit conflict. Indeed, every other court of appeals to consider the question has reached the same result, and no judge has dissented on that issue. See *PFL*, 772 F.3d at 272-273; *Michigan Catholic Conference & Catholic Family Servs.* v. *Burwell*, 755 F.3d 372, 394-395 (6th Cir. 2014), vacated on other grounds, 135 S. Ct. 1914 (2015), reissued in relevant part, 2015 WL 4979692 (Aug. 21, 2015); *University of Notre Dame* v. *Sebelius*, 743 F.3d 547, 560 (7th Cir. 2014), vacated on other grounds, 135 S. Ct. 1528 (2015); see also *Geneva Col-*

lege, 778 F.3d at 443 (rejecting analogous arguments presented under RFRA). The Establishment Clause question thus does not warrant this Court's review.

CONCLUSION

The Court should hold the petitions for writs of certiorari pending the disposition of the petition in *Roman Catholic Archbishop of Washington* v. *Burwell*, No. 14-1505 (filed June 19, 2015), and then dispose of these petitions as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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SEPTEMBER 2015

No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* CATHOLIC DEFENSE LEAGUE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The text of the Affordable Care Act (ACA) says nothing about contraceptive coverage, but it does require employers to "provide coverage" for "preventive care" for women. The Department of Health and Human Services (HHS) has interpreted that statutory mandate to require employers through their healthcare plans to provide at no cost the full range of FDA approved contraceptives, including some that cause abortions. Despite the obvious implications for many employers of deep religious conviction, HHS decided to exempt only some nonprofit religious employers from compliance. As to all other religious employers, HHS demanded compliance, either directly or via a regulatory mechanism through which they must execute documents that authorize and obligate third parties to use their healthcare plans to facilitate the provision of contraceptive coverage to their employees and that, in the government's view, put these religious employers and their plans in compliance with the statutory "provide coverage" obligation.

This Court has already considered the direct method of compliance and concluded that it imposes a substantial burden on religious exercise and violates the Religious Freedom Restoration Act (RFRA). It is undisputed, however, that nonexempt religious employers such as petitioners hold equally sincere religious objections to the regulatory method of compliance as well. It is further undisputed that they face draconian fines if they refuse to comply via one of those two avenues.

The questions presented are:

1. Does the availability of a regulatory method for nonprofit religious employers to comply with HHS's contraceptive mandate eliminate either the substantial burden on religious exercise or the violation of RFRA that this Court recognized in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014)?

2. Can HHS satisfy RFRA's demanding test for overriding sincerely held religious objections in circumstances where HHS itself insists that overriding the religious objection will not fulfill HHS's regulatory objective - namely, the provision of no-cost contraceptives to the objector's employees?

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No. 15-105

IN THE
Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

INTERESTS OF *AMICUS CURIAE*[1]

Amicus Catholic Defense League ("CDL") is a group of Catholic men and women who have come together to defend the Roman Catholic Church (the "Catholic Church," or simply the "Church"). As a non-profit Section 501(c)(3) organization based in St. Paul, Minnesota, CDL strives to protect the Catholic

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the blanket written consent by all parties, which they have filed with the Court.

Church, its bishops, priests and religious from unwarranted attacks or misleading information from many sources. This includes defending against misrepresentation of the positions or doctrine of the Church, rebutting ridicule of ministers of the Church, correcting erroneous statements about what the Church has done, and responding to subtle and even deliberate falsehoods concerning the Church.

In addition to defending against these specific attacks, *Amicus* CDL also works to protect freedom of religion against the barriers created by lawmakers, judges, anti-religious and anti-Catholic groups, and politically correct narratives of an increasingly secular humanist society, which tend to prevent Catholics from maintaining and expressing their Catholic identity. CDL also works to bring the voice of Catholics into the public square.

Amicus CDL has a direct and vital interest in this case by virtue of its goal to defend religious members of the Church against being forced to violate their consciences in a manner contrary to the doctrine of the Church. In addition, there is a Little Sisters of the Poor Home based in the same city as CDL's headquarters, Saint Paul, Minnesota, so CDL has a local interest too. Accordingly, CDL respectfully submits this amicus brief in support of Petitioners Little Sisters of the Poor Home for the Aged of Denver, Colorado, *et al.* ("Little Sisters of the Poor," or simply the "Sisters").

SUMMARY OF ARGUMENT

Government cannot lawfully compel the Little Sisters of the Poor to be complicit in activities that breach their faith. Centuries of Church doctrine teach that cooperating in sin can be as wrong as committing the sin itself. The Catholic Church automatically excommunicates not only those who directly participate in abortion, but also those who facilitate it. Moral culpability for facilitating sin is central to religious doctrine, and is not something for a court to second-guess. While some non-Catholics may view abortion and abortifacient contraceptives to be part of healthcare, the Catholic Church holds that they are gravely sinful. Millions of Catholics are duty-bound to abide by the Church or face eternal consequences, which no secular court can excuse. The Sisters should be allowed to comply fully with Church doctrine without being coerced into complicity with sin.

Fortunately, the Religious Freedom Restoration Act (RFRA) mandates full accommodation of religion by generally prohibiting the federal government from coercing people to transgress their faith. Under RFRA, an individual need not choose between draconian fines, on the one hand, and the risk of automatic excommunication on the other. But the court below erred in failing to apply RFRA to safeguard the Sisters against forced complicity in a contraceptive program condemned as sin by the Church.

In light of *Hobby Lobby*, which established full rights under RFRA for a closely held for-profit commercial enterprise, one might be dismayed to find the Sisters here at all. The Tenth Circuit was

mistaken in declaring that there is a significant difference between this case and *Hobby Lobby*. *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1160 (10th Cir.), *cert. granted*, 136 S.Ct. 446 (2015). The Sisters are entitled to every bit of protection against dilution of their faith by government, just as the for-profit Hobby Lobby was. Whether the hoops imposed by government for the Sisters to jump through, to try to protect their souls, are an adequate accommodation is a decision for the Sisters to make, not the government. The Sisters are in a far better position than the Tenth Circuit to determine whether the regulatory scheme substantially burdens their religious exercise, and the court below erred in ruling otherwise.

The Catholic Church does not excuse sin based on opinion or pressure by secular authority. Excommunication is automatic under longstanding Church doctrine for certain offenses, including facilitation of abortifacients. The government has improperly pushed the Sisters toward complicity in activities that, in some situations, trigger automatic exclusion from God and the Church under their faith. RFRA does not allow this harmful overreaching by government.

More generally, respect for the dignity of others requires, at a minimum, respect for their rights of conscience. Prior to the Constitution, Quakers were not compelled to help the Continental Army during the Revolutionary War. The American tradition to respect the rights of conscience of others lies at the very heart of our traditions. General George Washington was hindered by how Quakers would not assist during the American Revolution, but he

respected their religious-based decision. The Court should do no less in honoring fully the rights of the Sisters based on their faith.

Sir Thomas More was put to death for refusing to violate Catholic doctrine by capitulating to the demands of his sovereign state. That was some 250 years before the U.S. Constitution, and 450 years before enactment of RFRA, but the issue at bar is not conceptually different. RFRA should be applied to ensure that no one in the United States is forced to abandon his or her faith in order to avoid draconian fines by government, and this law requires judgment in favor of the Sisters.

ARGUMENT

At issue is whether government can place the Sisters between the proverbial rock and a hard place, by requiring the Sisters either to arrange for a health plan that facilitates access to abortion-inducing drugs, at the Sisters' spiritual peril, or to decline and thereby endure harsh fines of $2000 annually per full-time employee, plus $100 daily for each individual who is affected. *See* 26 U.S.C. §§ 4980H(c)(1) and 4980D(b)(1).

The Tenth Circuit erred in attempting to downplay and marginalize the Sisters' moral objections to participating in this scheme. 794 F.3d at 1173-74. The court went even further, ruling that an administrative accommodation available to the Sisters actually "relieves them from complicity." *Id.* at 1174. RFRA does not allow the court to substitute its judgment about morality for the religious group.

RFRA protects the Sisters against government placing them in such a bind, making it impossible for them to comply with both their faith and the law.

I. The Court Below Erred in Ignoring the Severity of the Burden and Infringement on Catholic Faith, which Triggers Protection by *Hobby Lobby*.

Respondents' regulatory mandate at issue here requires that the Sisters arrange for and facilitate use of abortifacients for participants in their insurance plan, despite how facilitating use of these drugs causes abortion and thereby subjects the Sisters to automatic excommunication from the Church. This requirement by the government plainly violates RFRA, and the lower court should not have attempted to downplay the severity of the burden on the Sisters' faith. *See, e.g.*, *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 715 (1981) (holding, even before RFRA, that "courts should not undertake to dissect religious beliefs").

Specifically, the Sisters are being required to "sign off" on usage of treatments that include *ella*, which causes abortions as a selective progesterone receptor modulator. The prescribing information for *ella* on the FDA's own website warns physicians to "[e]xclude pregnancy before administering" and that "[e]mbryofetal loss was noted in all pregnant rats and in half of the pregnant rabbits," and in 40% of

pregnant monkeys.[2] Though misleadingly called a "contraceptive", *ella* (ulipristal acetate) actually operates like RU-486 (mifepristone), by inhibiting the progesterone that is essential to maintaining a healthy uterine wall.[3] *Ella* "thereby starves a developing baby of this needed protein," which causes an abortion.[4] Yet *ella* is one of the treatments that Respondents demand the Sisters arrange for, sign off on, and facilitate.

"The owners of the businesses have religious objections to abortion, and according to their religious beliefs the four contraceptive methods at issue are abortifacients." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2759 (2014). On that basis this Court held, less than two years ago, that a non-religious private company had an exemption under RFRA from being compelled to pay for contraceptives. Yet the Tenth Circuit denied the conceptual equivalent to the Sisters, whose religious vows plainly prohibit them from arranging the use of abortifacients.

The Little Sisters of the Poor are a pillar of the Catholic Church in their devotion to doctrine, their untiring service of the poor, and their missionary

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[2] http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf (pp. 1, 4) (viewed Jan. 6, 2016).

[3] "Mifepristone, also known as RU-486, is a prescription drug that terminates a pregnancy by detaching the gestational sac from the uterine wall. In the clinical trials, the woman returned two to four days later and took a second medication, misoprostol, which induced contractions to complete the medication abortion." *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 254 (Iowa 2015).

[4] http://www.frc.org/onepagers/the-truth-about-ella (viewed Dec. 29, 2015).

work. With roots that go back to shortly after the Civil War in the United States, and earlier in France, the Little Sisters of the Poor are a beacon of the Catholic faith in a sometimes-hostile secular world, on all six populated continents.[5] To many millions of the public, the Sisters are the face of the Catholic Church and comprise one of its most supportive arms.

Central to the Sisters' success is their faith and adherence to Catholic doctrine. Much of their daily routine is devoted to prayer, including a Marian devotion that consists of adoration of the Virgin Mary. The Sisters typically eat their meals in contemplative silence. They take four primary vows: chastity, poverty, obedience, and hospitality. Their garments include wearing a religious habit, typically black with a gray veil, "as a reminder to ourselves that we belong totally to God, as a sign and witness to others of our consecration and of God's presence in the world."[6]

The Sisters publicly strive to "be conformed to the mind and heart of Christ, so that [they] may do what is God's will, what is good, pleasing ***and perfect***."[7] The passage of the Bible that guides the Sisters includes this statement:

> And ***be not conformed to this world***: but be ye transformed by the renewing of your mind, that ye

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[5] http://www.littlesistersofthepoor.org/index.php/ourlife/worldwide-expansion (viewed Jan. 6, 2016)

[6] http://www.littlesistersofthepoor.org/index.php/ourlife/vowedlife (viewed Dec. 30, 2015).

[7] *Id.* (citing Romans 12:1–2, emphasis added).

> may prove what is that good, and acceptable, and perfect, will of God.

Romans 12:1-2 (King James Version, emphasis added). Put another way, the Sisters embody "religious consecration," which "means to make profession of having but one life, one heart, one soul and one will with Jesus."[8]

In denying the claim for a religious exemption below, the Tenth Circuit erred in failing to recognize the severity of the infringement on the religious devotion of the Little Sisters of the Poor. In its section entitled "No substantial burden from complicity," the lower court acknowledged that the Sisters "wish to play no part in" this scheme, but then ruled that "[w]e find this argument unconvincing for a number of reasons," and that "[o]pting out would eliminate their complicity with the Mandate and require only routine and minimal administrative paperwork." 794 F.3d at 1190, 1191, 1193. As explained below, each of the Tenth Circuit's bases for denying the Sisters' claim of unlawful infringement is without merit and should be reversed.

First, the Tenth Circuit held that "the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit—that they do not have to provide, pay for, or facilitate contraception." *Id.* at 1191 (emphasis in original). But the secular "purpose and design" are irrelevant to the religious question of whether the Sisters' signing off on the scheme constitutes a sinful facilitation of it. That question is one that only the Sisters can answer, and

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[8] *Id.*

they have confirmed that they cannot in good conscience complete the paperwork.

Second, the Tenth Circuit reasoned that because the Sisters "do not object to signing forms and paperwork generally," somehow they do not have a valid RFRA claim to object to signing the EBSA Form 700 for opting out of the contraceptive mandate. *Id.* at 1191. "RFRA does not require us to defer to [plaintiffs'] erroneous view about the operation of the ACA and its implementing regulations," the Tenth Circuit held. *Id.* Perhaps the latter statement is correct as to not deferring to a litigant's view of the law, but RFRA ***does*** require courts to defer to the Sisters on what degree of complicity in a scheme constitutes a violation of their faith. The Tenth Circuit failed to accord the Sisters that essential level of deference as to what is sinful, as can only be determined by the Sisters pursuant to their own beliefs.

Third, the lower court held that the act of opting out "does not involve them in providing, paying for, facilitating, or causing contraceptive coverage," and that this "*de minimis* administrative task" does not substantially burden the Sisters' religious beliefs. *Id.* at 1192. The court drew an analogy with conscientious objection procedures, which require completion of an exemption form in wartime. *See id.* at 1213-15. But that exemption form is not to authorize the war to which the person objects, while the form demanded of the Sisters here does help establish the program to which they object. The analogy to conscientious objectors does illustrate our Nation's rich tradition to respect people's religious beliefs and not force them to participate in something

against their faith, which is all that the Sisters seek here.

As George Washington explained to the Quakers, despite how they refused to help him during the American Revolution:

> In my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.

City of Boerne v. Flores, 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting) (quoting Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed. 1932).

It does not matter how "minimal" the administrative task is; after all, injecting a lethal dose for capital punishment does not require much time or effort either, but no one would compel a conscientious objector to administer the death penalty. What matters is not the time and effort entailed, but the moral line that is being crossed, and the government should not be allowed to push the Sisters across it.

RFRA exists to prevent precisely this type of overbearing interference by government with the private practice of one's faith. *See, e.g.*, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010) ("We conclude that a religious exercise is substantially burdened ... when a government ... requires

participation in an activity prohibited by a sincerely held religious belief ...."), *cert. denied*, 562 U.S. 967 (2010).

As Professor Douglas Laycock observed:

> The Religious Freedom Restoration Act is the most important congressional action with respect to religion since the First Congress proposed the First Amendment. It resembles the great civil rights acts both in its sweep and in its restatement of fundamental principles. Apart from the various laws based on nondiscrimination models, there is no civil liberties statute of comparable importance.

Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 243 (1994). "RFRA is not a mere technical change from *Smith*. Rather, it restores a fundamentally different vision of human liberty." *Id.* at 244 (citing *Employment Division v. Smith*, 494 U.S. 872 (1990)).

Yet the Obama Administration violates RFRA here by substantially burdening the free exercise of religion without a compelling interest and without using the least restrictive means available. *See* 42 U.S.C. § 2000bb-1. The sincerity of the religious beliefs of the Little Sisters of the Poor can hardly be doubted, and the truth of their beliefs as reinforced by the Catholic Church should not be questioned by a court. The Sisters must "answer to no man for the verity of [their] religious views." *United States v. Ballard*, 322 U.S. 78, 87 (1944). The decision by the Tenth Circuit below should be reversed.

II. Respect for Dignity Requires Respect for the Sisters' Faith-Based Refusal To Be Complicit in Activity Deemed Immoral.

Catholic doctrine, to which the Sisters have devoted their lives, is crystal clear about this: complicity in sin is itself sinful. Explained by the Catholic Catechism under the title "Respect for the Dignity of Persons," this doctrine compels the faithful to protect the souls of ***others***, not just of oneself. This doctrine, sometimes called the doctrine of "scandal", requires Catholics to refrain from supporting activities that lead others astray and towards sin.

As the D.C. Circuit explained in one of the cases among the *Hobby Lobby* line of decisions:

> "instructing or encouraging someone else to commit a wrongful act is itself a grave moral wrong—i.e., 'scandal'—under Catholic doctrine."

Gilardi v. United States HHS, 733 F.3d 1208, 1215 (D.C. Cir. 2013) (quoting Brief of Catholic Theologians at 3), *vacated*, 134 S.Ct. 2902 (2014). *See also Priests for Life v. United States HHS*, 2015 U.S. App. LEXIS 8326, at *26 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc) (noting the Catholic doctrine of scandal in determining whether conduct constitutes impermissible facilitation of wrongdoing according to one's faith), *cert. granted*, 136 S.Ct. 446 (2015); *Spacco v. Bridgewater Sch. Dep't*, 739 F. Supp. 30, 33 (D. Mass. 1990) (observing that "all leases of property by the Archbishop of Boston" include a termination clause to "prevent public scandal," which "would be

use of Church property ... in a fashion contrary to basic Roman Catholic doctrines and values") (inner quotations omitted).

It is pursuant to this theology that Catholics are automatically excommunicated merely for arranging or facilitating abortions. Typically the Church does not issue an individualized order of excommunication; instead, its rules operate in an automatic manner for anyone who facilitates the occurrence of a sin as grave as abortion.[9] The Church recognizes that individuals do have culpability when they lead others astray, and Church members need to respect to the dignity of others with respect to their spiritual well-being. This doctrine thereby embodies the "respect for the dignity of persons" that has been emphasized by this Court even in secular contexts. *See, e.g., Obergefell v. Hodges*, 135 S.Ct. 2584, 2594-2608 (2015) (citing "dignity" nine times in interpreting the Constitution in favor of a right).

The Catechism of the Church explains that the sin:

> is an attitude or behavior which leads another to do evil. [T]he person who gives scandal becomes his neighbor's tempter. He damages virtue and integrity; he may even draw his brother into spiritual death. ***Scandal is a grave offense if by***

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[9] "Life must be protected with the utmost care from the moment of conception: abortion and infanticide are abominable crimes ... [to which] [t]he Church attaches the canonical penalty of excommunication." Catechism of the Catholic Church ¶¶ 2271-72, http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm#I (viewed Jan. 6, 2016).

> ***deed or omission another is deliberately led into a grave offense.***

Catechism of the Catholic Church ¶ 2284 (emphasis added).[10]

Church doctrine even emphasizes that the sin is particularly grave for those who commit it in positions of authority, such as the Sisters:

> Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized. It prompted our Lord to utter this curse: "Whoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened round his neck and to be drowned in the depth of the sea." Scandal is grave when given by those who by nature or office are obliged to teach and educate others. Jesus reproaches the scribes and Pharisees on this account ....

Id. ¶ 2285 (quoting Mt 18:6, and then citing, for the reference to the Pharisees, Mt 7:15). If the Sisters were to "sign off" on these abortifacients, then their position of authority would lend credibility to an act deemed gravely sinful by the Church, and such "signing off" is what Church doctrine prohibits.

Indeed, this "grave offense" of scandal "can be provoked by laws or institutions, by fashion or opinion," and those who establish laws or guidelines that lead to sin are likewise guilty of it:

> Therefore, they are guilty of scandal who establish laws or social structures leading to the decline of

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[10] *Id.*

> morals and the corruption of religious practice, or to "social conditions that, intentionally or not, make Christian conduct and obedience to the Commandments difficult and practically impossible."

Id. ¶ 2286 (quoting Pius XII, Discourse, June 1, 1941).

Catholic doctrine emphasizes further that those who wield power to lead others toward wrongdoing are fully and automatically responsible:

> Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged. "Temptations to sin are sure to come; but woe to him by whom they come!"

Id. ¶ 2287 (quoting Lk 17:1).

The Sisters seek to remain true to Church doctrine, and under RFRA they have a right to do so. The Tenth Circuit erred in downplaying the severity of the spiritual consequences for the Sisters if they were to "sign off" to facilitate the program of contraceptives, with its inclusion of abortifacients, as required by Respondents. To non-believers, the requirement that a religious group sign off on a program demanded by the Obama Administration (or by any Administration) may seem to be an inconsequential burden on religion. But under the foregoing Catholic doctrine, to which the Sisters (and many millions of others) unquestionably subscribe, it is a matter of spiritual and eternal life or death. RFRA protects Americans against this very predicament, as do pre-RFRA precedents of this

Court dating back more than a century. *See, e.g.*, *United States v. Ballard*, 322 U.S. at 86 ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'") (quoting *Watson v. Jones*, 80 U.S. 679, 728 (1872)).

The *Hobby Lobby* decision construed RFRA to require that "in order for the HHS mandate to be sustained, it must also constitute the least restrictive means of serving that interest, and the mandate plainly fails that test." 134 S.Ct. at 2759. Here, as in *Hobby Lobby*, "[t]here are other ways in which Congress or HHS could equally ensure that every woman has cost-free access to the particular contraceptives at issue here and, indeed, to all FDA-approved contraceptives." *Id.* There are no legitimate goals of the government that justify compelling the Sisters to violate the foregoing Church doctrine against facilitating sin, by forcing the Sisters to "sign off" on the abortifacients. If a prisoner has a right "to wear a headband in his cell and during religious ceremonies ..., and have a supply of venison for the Ghost Feast," then the Sisters cannot be lawfully compelled to file paperwork to facilitate abortifacients. *Schlemm v. Wall*, 784 F.3d 362, 366 (7th Cir. 2015) (Easterbrook, J.).

CONCLUSION

For the foregoing reasons, the decision below should be reversed and judgment should be granted in favor of the Sisters.

Respectfully submitted,

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No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED et al,

Petitioners,

v.

SYLVIA BURWELL, SECRETARY OF HEALTH AND HUMAN SERVICES, et al,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers.

The Foundation has an interest in this case because it believes the Free Exercise Clause of the First Amendment protects the right of the Little Sisters of the Poor and other nonprofit corporations to refrain from providing, paying for, or otherwise authorizing or triggering abortion and contraception coverage.

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[1] Pursuant to this Court's Rule 37.3All parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

The Framers understood the First Amendment to maximize the protection of free exercise of religion throughout this nation. To ensure that protection was not compromised in the modern era, Congress enacted the Religious Freedom Restoration Act to prevent government from substantially burdening free exercise without a compelling interest that cannot be achieved by less restrictive means.

The Little Sisters of the Poor and other petitioners strongly believe that human life is sacred, and they believe human life begins at conception. Accordingly, a law that requires them to provide, pay for, or otherwise authorize or trigger abortion/conception substantially burdens their religious convictions.

Telling the Little Sisters that the alternative method of compliance provision of the Affordable Care Act (ACA) does not substantially burden their free exercise of religion, the Tenth Circuit has in effect defined the Little Sisters' religious beliefs, for it is impossible to conclude that a burden is insubstantial without effectively defining the belief it burdens. And when this decision is read in concert with *Burwell v. Hobby Lobby*, ___ U.S. ___, 134 S.Ct. 2751 (2014), it has the anomalous result of making for-profit corporations more free to be exempt from the ACA than nonprofits.

In reaching this bizarre result, the Tenth Circuit has misunderstood and undermined decisions

of this Court, the Religious Freedom Restoration Act (RFRA), and the Free Exercise Clause of the First Amendment.

ARGUMENT

Introduction

Suppose a person who believes on the basis of religious conviction that all killing is wrong, is ordered by government to shoot a prisoner. He objects that this places a substantial burden on his free exercise of religion. Suppose, further, that this person is given an alternative -- instead of personally killing the prisoner, he can pay another person $1,000 to kill the prisoner. He objects that he is still facilitating murder and this substantially burdens his free exercise.

So then he is given a third alternative: he can receive a so-called accommodation of the killing by signing a paper stating his objection, and someone else will be ordered to kill the prisoner instead. Some might find this acceptable, or at least minimally burdensome, but some would not. Some would say that what matters is not who does the killing, nor who pays for the killing; what matters is that the killing is done at all, and this person's part in authorizing or triggering the killing, regardless of how remote or minimal it may seem to some, compromises and substantially burdens a religious conviction so fundamental as the sanctity of human life.

Amicus suggests that the position of the Little Sisters of the Poor is comparable to that of the person who faces this third alternative – using a so-called accommodation of killing, but by doing so facilitating and triggering abortion/contraception which the Little Sisters believe is a flagrant violation of the sanctity of human life.

Amicus assumes counsel for Little Sisters of the Poor will address the details of the Little Sisters' insurance coverage as compared with that of the other Petitioners. Instead, *Amicus* will address the issue of whether the Affordable Care Act (ACA) imposes a substantial burden upon the Little Sisters by forcing them to use an alternative method of compliance of abortion/contraception coverage and trigger coverage by a Third-Party Administrator (TPA).

I. EVEN IF THE "ALTERNATIVE METHOD OF COMPLIANCE" PROVISION HAS REDUCED THE BURDEN ON FREE EXERCISE OF RELIGION, THE BURDEN IS STILL SUBSTANTIAL.

A previous Tenth Circuit decision cited by the court below is not on point. *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008), involved a man who shot an eagle without a permit for use in a tribal religious ceremony. The Tenth Circuit expressed skepticism that the permit requirement constituted a substantial burden but did not decide that issue because Mr. Friday had not raised it.

And the Tenth Circuit's citation and misreading of this Court's recent decision in *Holt v. Hobbs*, ___ U.S. ___, 135 S.Ct. 853 (2015), reflects the Tenth Circuit's misunderstanding of the accommodation requirement regarding the First Amendment, the Religious Freedom Restoration Act (RFRA), and the decisions of this Court. Holt challenged the prison's prohibition on inmate beards, saying the prohibition violated his Muslim faith; prison officials resisted, saying the prohibition was necessary to prevent inmates from concealing weapons. Holt proposed a half-inch beard compromise, which the prison refused but the Court accepted.

The Tenth Circuit reads *Holt* to say that so long as the government has offered an accommodation or compromise, its duty under the First Amendment and RFRA is satisfied. But that is not what this Court said. This Court accepted the accommodation because Holt said it was acceptable, that is, his religion required him to have a beard, the prison's no-beards rule substantially burdened the exercise of his religion, but a requirement that he limit his beard to one-half inch was not a substantial burden as even Holt agreed. In other word, this Court has said the government's accommodation must either eliminate the burden or reduce the burden so it is no longer substantial. In this case, the burden on the Little Sisters is still substantial.

Amicus believes the Tenth Circuit ruling below conflicts with and undermines landmark decisions of this Court, and therefore this Court should reaffirm

these decisions as the true meaning of the First Amendment. Furthermore, the companion cases that the Tenth Circuit decided along with the case at hand, demonstrate that the federal district courts in the Tenth Circuit are split and uncertain about this issue. Moreover, there are innumerable organizations and individuals throughout the nation who are affected by the ACA and need to know whether the ACA applies to them and what it requires of them.

The Tenth Circuit ruling below says the question whether a burden on free exercise of religion is substantial is an objective question that the Court must answer. *Amicus* believes that the question of the substantiality of the burden depends to a very large extent on the nature of the religious belief itself, and therefore the person's or organization's perception of the burden as substantial is entitled to considerable discretion by the courts.

II. THE *BALLARD* DECISION PROHIBITS THE GOVERNMENT FROM CHALLENGING THE OBJECTIVE TRUTH OF A RELIGIOUS CONVICTION.

Two landmark decisions by this Court support our contention that the courts should give very considerable deference to the Little Sisters' claim that the alternative method of compliance requirement imposes a substantial burden on their free exercise of religion. The first of these landmark cases is *Ballard et al. v. United States*, 322 U.S. 78 (1944). *Ballard* had been convicted of mail fraud

because, as the founder and president of the "I Am" movement, he had sent out mailings in which he claimed that he was in communication with angels and had the power to heal persons afflicted with many diseases, and that, in return for a donation, he would intercede on the donor's behalf and heal the donor. The trial court had instructed the jury that they could not consider whether or not *Ballard*'s claims were objectively true, but they could consider whether or not *Ballard* sincerely believed the claims. The jury concluded that *Ballard* did not sincerely believe the claims and therefore they found him guilty of fraud.

Speaking for the Court, Justice Douglas reversed the conviction. Fraud consists of a false statement, known by the defendant to be false, communicated to a third party with intent that the third party act upon that statement to his/her detriment. However, Justice Douglas said, the statement must be objectively false, and because the jury is not authorized to pass judgment on the truth or falsity of a religious statement, they cannot satisfy the first element of fraud. The Court ruled at ___:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728, 20 L.Ed. 666. The First Amendment has a dual aspect. It not only "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the

chosen form of religion." *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be'" Id., 310 U.S. at pages 303, 304, 60 S.Ct. at page 903, 84 L.Ed. 1213, 128 A.L.R. 1352. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Board of Education by Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The

miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*,

> 319 U.S. 105, 63 S.Ct. 870, 891, 87 L.Ed. 1292, 146 A.L.R. 81. As stated in *Davis v. Beason*, 133 U.S. 333, 342, 10 S.Ct. 299, 300, 33 L.Ed. 637. "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with." See *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438.

Justice Jackson, in his dissent at *Id.* ___, went even further than Justice Douglas in his insistence that the government may not evaluate or even inquire into a person's religious beliefs and statements:

> ...[A]s a matter of either practice or philosophy I do not see how we can separate an issue as to what is believed from considerations as to what is believable. The most convincing proof that one believes his statements is to show that they have been true in his experience. Likewise, that one knowingly falsified is best proved by showing that what he said happened never did happen. How can the Government prove these persons knew

something to be false which it cannot prove to be false? If we try religious sincerity severed from religious verity, we isolate the dispute from the very considerations which in common experiences provide its most reliable answer.

In the second place, any inquiry into intellectual honesty in religion raises profound psychological problems. William James, who wrote on these matters as a scientist, reminds us that it is not theology and ceremonies which keep religion going. Its vitality is in the religious experiences of many people. "If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, changes of heart, deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways." If religious liberty includes, as it must, the right to communicate such experiences to others, it seems to me an impossible task for juries to separate fancied ones from real ones, dreams from happenings, and hallucinations from true clairvoyance. Such experiences, like some tones and colors, have existence for one, but none at all for another. They cannot be verified to the minds of those whose field

of consciousness does not include religious insight. When one comes to trial which turns on any aspect of religious belief or representation, unbelievers among their judges are likely not to understand and are almost certain not to believe him.

And then I do not know what degree of skepticism or disbelief in a religious representation amounts to actionable fraud. James points out that "Faith means belief in something concerning which doubt is theoretically possible." Belief in what one may demonstrate to the senses is not faith. All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce. Some who profess belief in the Bible read literally what others read as allegory or metaphor, as they read Aesop's fables. Religious symbolism is even used by some with the same mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges. It is hard in matters so mystical to say how literally one is bound to believe the doctrine he teaches and even more

difficult to say how far it is reliance upon a teacher's literal belief which induces followers to give him money.

There appear to be persons—let us hope not many—who find refreshment and courage in the teachings of the "I Am" cult. If the members of the sect get comfort from the celestial guidance of their "Saint Germain," however doubtful it seems to me, it is hard to say that they do not get what they pay for. Scores of sects flourish in this country by teaching what to me are queer notions. It is plain that there is wide variety in American religious taste. The Ballards are not alone in catering to it with a pretty dubious product.

The chief wrong which false prophets do to their following is not financial. The collections aggregate a tempting total, but individual payments are not ruinous. I doubt if the vigilance of the law is equal to making money stick by over-credulous people. But the real harm is on the mental and spiritual plane. There are those who hunger and thirst after higher values which they feel wanting in their humdrum lives. They live in mental confusion or moral anarchy and seek vaguely for truth and beauty and moral support. When they

are deluded and then disillusioned, cynicism and confusion follow. The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

Prosecutions of this character easily could degenerate into religious persecution. I do not doubt that religious leaders may be convicted of fraud for making false representations on matters other than faith or experience, as for example if one represents that funds are being used to construct a church when in fact they are being used for personal purposes. But that is not this case, which reaches into wholly dangerous ground. When does less than full belief in a professed credo become actionable fraud if one is soliciting gifts or legacies? Such inquiries may discomfort orthodox as well as unconventional religious teachers, for even the most regular of them are sometimes accused of taking their orthodoxy with a grain of salt.

I would dismiss the indictment and have done with this business of

> judicially examining other people's faiths.

Subsequent court decisions have followed and enlarged upon the *Ballard* principle. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976), this Court refused to intervene in an internal church dispute concerning church discipline, church governance, and the removal of a bishop, holding at 713 that the First Amendment requires the courts to accept the church's decisions "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." Reversing the Illinois Supreme Court, this Court stated further at 708,

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.

The leadership of the Little Sisters of the Poor, like the hierarchy of the Roman Catholic Church to which they belong and to whose authority they submit, has determined that forcing the Little Sisters to name a Third-Party Administrator and thereby authorize that TPA to provide abortion and birth control coverage and trigger that coverage, forces the

Little Sisters to violate their religious beliefs and therefore constitutes a substantial burden upon the exercise of their religious beliefs. By determining that the TPA requirement does not impose a substantial burden upon the Little Sisters' religious beliefs, the Tenth Circuit has taken upon itself the authority of defining the Little Sisters' beliefs and determining what constitutes a substantial burden upon them, and has also placed itself between the Little Sisters and the hierarchy of their order and that of the Roman Catholic Church. In so doing, the Tenth Circuit has exceeded its jurisdiction and its competence.

The First Circuit cited *Milivojevich* in *Natal v. Christian and Missionary Alliance,* 878 F.2d 1575 (1989), in which a pastor challenged his dismissal by the denomination. The First Circuit ruled at 1578,

> We, like plaintiffs, are obligated to accept the Church's decisions "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese,* 426 U.S. at 713, 96 S.Ct. at 2382. Because of the difficulties inherent in separating the message from the messenger—a religious organization's fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents—Natal's case necessarily falls within the scope of the Court's monition. By its

> very nature, the inquiry which Natal would have us undertake into the circumstances of his discharge plunges an inquisitor into a maelstrom of Church policy, administration, and governance. It is an inquiry barred by the Free Exercise Clause.

The Tenth Circuit has not questioned the sincerity of the Little Sisters' religious beliefs, but they concluded that the burden imposed upon their beliefs by the ACA was not substantial because of the "alternative method of compliance" provision. However, in so doing, the Tenth Circuit has questioned the nature of the Little Sisters' religious beliefs.

It is impossible to determine whether a law imposes a substantial burden on a person's religious beliefs, without determining what that person believes. Suppose, for example, that Congress passes a bill that prohibits baptism possibly claiming that baptism spreads infectious diseases or causes psychological trauma. That would burden the free exercise of religion for those churches and individuals that practice infant baptism. But would it be a substantial burden? That might depend upon the significance of baptism in various church traditions. Some churches consider baptism to be (A) only a sign or symbol. Others believe baptism is (B) a means of grace by which God conveys saving faith to the recipient. Still others believe baptism is (C) closely related to salvation, or, for a few churches, (D) essential to salvation. Those who believe (A) would

likely say that although baptism is a Scriptural command, the lack of baptism does not affect one's eternal salvation. Those who believe (D) would say baptism or the lack thereof determines one's eternal destiny in heaven or hell. Those who believe (B) and (C) would place the significance of baptism somewhere between (A) and (D).

Applying the substantial burden test, a court might conclude that a law prohibiting baptism is a substantial burden on churches and individuals who believe (D), not a substantial burden for those who believe (A), "sort of substantial" for those who believe (C), and "borderline" for those who believe (B). But in order to reach these conclusions, the court would have to engage in detailed study of the religious beliefs and traditions of each of these churches, recognizing that even within a denomination not all members, pastors, and theologians believe exactly the same.

The Little Sisters claim that providing abortion and contraception coverage violates their religious beliefs and their exercise of those beliefs. Neither the Government nor the Court has questioned the sincerity of their claim. The Little Sisters claim that using an "alternative method of compliance" and thereby transferring the responsibility for coverage to a TPA is a substantial burden on their religious beliefs and their exercise of those beliefs. Rejecting that claim, the Court is in effect saying that either (1) the Little Sisters are insincere in claiming a substantial burden, or (2) the

Little Sisters are incorrect in claiming a substantial burden.

The Tenth Circuit says the question of the party's sincerity is subjective but the question of the substantiality of the burden is objective. However, the substantiality of the burden cannot be determined apart from an understanding of the party's religious beliefs. What is the nature and source of the religious objection? Does the party believe adherence to the law in question would simply be unwise? Does the party believe it would violate the command of the Church? Does the party believe it would violate the command of God?

And what are the consequences of adhering to the law in question? Does it incur eternal damnation? Does it incur Heaven's judgment here on earth? Could it lead to excommunication or other Church discipline? Or is God's disapproval alone enough to incur a substantial burden, for a person who believes obedience to God is one's supreme duty?

And even more to the point, do civil courts have either the competence or the jurisdiction to examine and pass judgment on these questions? And can civil courts analyze and pass judgment on these questions without engaging in the kind of "excessive entanglement" of government with religion that the Court says government should avoid?

To a secular-minded legislator or judge, the simple act of signing a form to use an alternative method of compliance abortion/contraception

coverage may seem too insignificant to constitute a substantial burden. But to parties like the Little Sisters who have devoted their lives to the service of Christ and His Church and who devoutly believe abortion and contraception are anathema in the eyes of God, it seems to be a total betrayal of their Catholic faith. The significance of disobeying God and following the law have to be evaluated in terms of the importance of this tenet as perceived by the party.

Amicus does not deny the theoretical possibility that there could be a case somewhere in which a party claims a burden is substantial when it really is not substantial. But such cases would have to be extremely rare. The very fact that the party is willing to undertake the expense in time and resources, as well as the inconvenience and trauma, of extended litigation in court, should create a presumption that the burden is substantial.

The purpose of this discussion in the light of *Ballard* is to demonstrate that when, as here, a party claims that a law imposes a substantial burden upon the exercise of the party's religious beliefs, and where, as here, there is absolutely no evidence and in fact absolutely no suggestion that the party's claim is insincere, the Court should give very high deference to the party's claim that the law imposes a substantial burden upon the exercise of his or her religious beliefs. The Tenth Circuit did not give that high deference to the Little Sisters' claim, and their decision should therefore be reversed.

III. THE THOMAS CASE HELD THAT COURTS MUST GIVE CONSIDERABLE DEFERENCE TO A PARTY'S CLAIM OF A RELIGIOUS BELIEF.

The Tenth Circuit ruling cites *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), but the Tenth Circuit decision is inconsistent with *Thomas*. A Jehovah's Witness, *Thomas* worked for Blaw-Knox fabricating sheet metal. After that division of the company closed, *Thomas* was transferred to a division that worked on tank turrets, at which time his employment was terminated because he refused to build tank turrets. He claimed unemployment compensation, and his claim was denied because his refusal to work constituted misconduct. He claimed this denial violated the First Amendment because his refusal was based upon his pacifist religious beliefs. He testified at 710:

> Q. And then when it comes to actually producing the tank itself, hammering it out; that you will not do. . . .
>
> A. That's right, that's right when . . . I'm daily faced with the knowledge that these are tanks. . . .
>
> * * * *
>
> A. I really could not, you know, conscientiously continue to work with armaments. It would be against all of the . . religious principles that . . I have come to learn. . . .

The Indiana Supreme Court denied his free exercise claim, stating that the basis for his beliefs was unclear but more a personal philosophical choice than a religious conviction: "A personal philosophical choice, rather than a religious choice, does not rise to the level of a first amendment claim." *Id.* at 713. The Indiana Court concluded that *Thomas* was "struggling" with his beliefs and that he could not "articulate" them precisely. The Court also noted that *Thomas* was unable to articulate why he objected to building tan'

In an 8-1 decision, the U.S. Supreme Court reversed the Indiana Supreme Court. The Court stated at 714,

> The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. [n7] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

The lower court noted that *Thomas* was willing to work at the foundry even though the foundry produced steel that would ultimately be used to make weapons. But as this Court observed at 714-15,

...[T]he Indiana court seems to have placed considerable reliance on the facts that *Thomas* was "struggling" with his beliefs, and that he was not able to "articulate" his belief precisely. It noted, for example, that *Thomas* admitted before the referee that he would not object to

> working for United States Steel or Inland Steel . . . produc[ing] the raw product necessary for the production of any kind of tank . . . [because I] would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience. . . .

271 Ind. at ___, 391 N.E.2d at 1131. The court found this position inconsistent with *Thomas*' stated opposition to participation in the production of armaments. But *Thomas*' statements reveal no more than that he found work in the roll foundry sufficiently insulated from producing weapons of war. We see, therefore, that *Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious

> beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ.

Another Jehovah's Witness also worked on tank turrets for Blaw-Knox. This man testified that he saw no conflict between this work and his religious beliefs and that he had never been admonished, disciplined, or excommunicated because of this work. The lower court reasoned that *Thomas*'s beliefs could not be religious because another adherent of same religion obviously did not share his beliefs. But this Court disagreed, stating at 715-16,

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise

> is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

The Little Sisters claim their objection to providing abortion/contraception coverage is religious. The Tenth Circuit does not deny that their objection is both religious and sincere.

The Little Sisters claim the alternate method of compliance provision also violates their sincere religious convictions. Again, the Tenth Circuit does not deny the sincerity of that claim.

The Little Sisters claim the alternative method of compliance provision constitutes a substantial burden on their religious beliefs -- possibly a lesser burden than would exist if the Affordable Care Act did not include the alternative method of compliance provision, but a substantial burden nevertheless. The Tenth Circuit and the Administration do not deny that the Little Sisters sincerely believe the burden is substantial, but they nevertheless contend that the Little Sisters' belief that the burden is substantial is objectively false. Amicus respectfully contends that the Tenth Circuit is mistaken in this holding.

The nature of a religious belief, and the degree to which a law burdens that belief, cannot be neatly separated. The Little Sisters base their beliefs and practices on the commands of God as revealed through the Roman Catholic Church. They believe they would sin against God and the Church if they were to provide abortion/contraception coverage, and they believe just as sincerely that they would sin against God and the Church if they were to sign an alternative method of compliance form or similar document. They, not the Court, must determine whether signing an alternative method of compliance form is a sin, and if so, how serious a sin.

When the Tenth Circuit tells the Little Sisters this burden is not substantial, the Court is essentially telling the Little Sisters what they believe. The Court is essentially telling the Little Sisters that signing the alternative method of compliance form would not be a serious sin, and that their belief that it is a serious sin is objectively false.

This comes close to telling the Little Sisters what doctrines and practices are central to their faith and what doctrines and practices are not central. This involves a detailed analysis of the Little Sisters' religious doctrine which the Tenth Circuit has neither the competence nor the jurisdiction to undertake.

The centrality of a doctrine or practice may vary from one denomination to another, and may even vary among individuals within the same denomination. Like the example of baptism given earlier, the significance of Communion would vary among denominations and individuals. Roman

Catholics consider the bread and wine of Communion to be the transubstantiated Body and Blood of Jesus Christ. Lutherans consider Communion to be a means of grace involving the "real presence" of Christ in the sacrament. Others such as Baptists generally regard Communion to be only an ordinance and the bread and wine (or grape juice) to be only symbols. Analyzing these doctrines within the broader concept of faith might lead a court to consider Communion a "central" doctrine or practice for Catholics, possibly central for Lutherans, and not central for Baptists. But as this Court recognized in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."2

And the question of centrality is closely related to the substantiality of the burden. Suppose the government allowed churches to serve Communion but prohibited (or required) the use of wine instead of grape juice. Would that be a substantial burden? To answer that question, a court would have to analyze

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2 The Tenth Circuit cited this case and further quoted this Court as saying "We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Id.* However, the Tenth Circuit failed to note that this Court did not decide the substantiality issue because it based its decision on other considerations.

the nature of the practice of Communion, both generally and in that denomination, the history of that practice, the doctrinal reasons for the practice, and the consequences (in the view of church adherents) of violating that practice. That kind of study is precisely the "excessive entanglement" this Court has said government must avoid, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The case of *United States v. Seeger*, 380 U.S. 163 (1965), is also instructive, even though the issue was the meaning of "religious" under Sec. 6(j) of the Universal Military Training and Service Act rather than in the First Amendment. The statute provided an exemption from military service for those who were opposed to military service on the basis of "religious training and belief." The Selective Service denied Seeger's claim for conscientious objector status, contending that his beliefs were not religious because the Act spoke of "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code." Seeger' and his co-plaintiffs did not claim to believe in a "Supreme Being" although he did believe in a "Supreme Reality." But this Court stated at 165-66,

> We have concluded that Congress, in using the expression "Supreme Being," rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or

> philosophical views. We believe that, under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders, we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Seeger demonstrates an inclination of this Court to defer substantially to a person or a religious group in determining the nature of their religious beliefs. The conscientious objection that was provided to Seeger because of his objection to killing in warfare, should also be provided to the Little Sisters because of what they perceive to be the killing of unborn children.

The Tenth Circuit has no constitutional authority to tell the Little Sisters what they believe, what aspects of their beliefs are central, what constitutes a burden on their beliefs, or how substantial those burdens may be. Unless there is evidence that the Little Sisters are insincere -- and there is none -- their claim that the alternative method of compliance out form still constitutes a substantial burden must be given very considerable deference. To paraphrase what this Court said in *Thomas*, there could be a claim of substantial burden that is so bizarre, so obviously contrived, and so obviously insincere, as not to be entitled to First

Amendment protection; but that is not the case here. Courts are not arbiters of scriptural interpretation, and the Tenth Circuit must not be allowed to tell the Little Sisters what they believe.

IV. THE DECISION BELOW MEANS NONPROFIT CORPORATIONS HAVE LESS RELIGIOUS FREEDOM THAN FOR-PROFIT CORPORATIONS.

If the Tenth Circuit decision is allowed to stand, the result would be an anomaly. This Court held in *Burwell v. Hobby Lobby*, that a for-profit closely-held corporation is entitled to an exemption from providing abortion/contraception coverage in violation of its religious beliefs. Although the reason is partly based on the wording of the Affordable Care Act itself, the result of this Court's *Hobby Lobby* decision coupled with the Tenth Circuit's Little Sisters decision is that for-profit closely-held corporations are exempt from this coverage but nonprofit corporations must sign an alternative method of compliance form, meaning for-profit corporations have greater First Amendment protection than nonprofit corporations, all for abortion/contraception coverage that most of the Little Sisters' employees probably do not need or want and are offended that it has to be part of their policies. This certainly cannot be the intent of the Framers of the First Amendment, nor of the Congress that adopted the Affordable Care Act, nor of this Court.

V. EXEMPTING THE LITTLE SISTERS FROM THIS ACA MANDATE IS A LESS RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S INTEREST.

Because the ACA is federal legislation, it is subject to the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488, 42 U.S. C. Sec. 2000bb - 2000bb-4, which prohibits federal legislation that substantially burdens one's free exercise of religion unless the government can demonstrate a compelling interest that cannot be achieved by less restrictive means. The constitutionality of RFRA as applied to the federal government was unanimously upheld by this Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

In *Hobby Lobby v. Burwell,* this Court held that exempting Hobby Lobby, a for-profit closely-held corporation, from the ACA mandate was a less restrictive means by which the government's interest in ACA could be fulfilled. Surely, then, exemption from this ACA mandate is an equally acceptable or more acceptable means of fulfilling the government's interest in ACA as applied to a nonprofit religious corporation like the Little Sisters, most of whose employees, we may assume, share the Little Sisters' religious and moral convictions about abortion and contraception, do not want abortion and contraception coverage, will not use abortion and contraception coverage, and resent having abortion and contraception coverage forced upon them.

CONCLUSION

Throughout this nation, individuals, nonprofit organizations, and government officials are looking for guidance concerning the implementation of these provisions of the Affordable Care Act. The Tenth Circuit has given them a convoluted ruling that results from conflicting district court decisions, that conflicts with *Ballard*, *Thomas*, and *Hobby Lobby*, and that leaves the consciences of the Little Sisters and others violated and compromised.

In other cases, this Court has expressed concern about communicating a message of animus or exclusion toward certain groups in society. For example, various religious activities like graduation prayers and religious displays have been held unconstitutional because, as this Court said in *Lee v. Weisman,* 505 U.S. 577 (1992), they may communicate a "message of exclusion to all those who do not adhere to the favored beliefs." *Id.* at 606. (Justices Blackmun, Stevens, and O'Connor, concurring). In another field, that of same-sex marriage, this Court recently held in *United States v. Windsor,* 123 S.Ct. 2675 (2013), and *Obergefell v. Hodges,* ___ U.S. ___ (2015), that laws evincing an animus toward homosexuals are unconstitutional because they exclude homosexuals from having their part in the institution of marriage which is so central in American society. Courts have expressed concern about sending a "message of exclusion on other matters, including advertisements with exclusively white models, *Housing Opportunities Made Equal, Inc., v. Cincinnati Enquirer, Inc.,* 943 F.2d 644, 658

(C.A. 6 (Ohio)), 1991), and deliberately choosing to speak to someone in a language that he or she does not understand, *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 935 fn 20 (A.A.9 (Ariz.), 1995).

Amicus respectfully suggests that the Tenth Circuit has sent a "message of exclusion" to the Little Sisters of the Poor and to others who share their beliefs. The Little Sisters believe that the unborn child is a living human person and therefore oppose abortion and birth control. They further believe that designating a TPA triggers abortion coverage and thereby encourages and facilitates the act of abortion which they consider to be killing an unborn child, and they therefore believe that forcing them to designate a TPA is a substantial burden on their religious beliefs. By telling them this is not a substantial burden, the Tenth Circuit has essentially told the Little Sisters that their beliefs about the designation of a TPA are wrong.

Unlike the plaintiffs in these Establishment Clause cases, the Little Sisters do not ask this Court to strike down the Affordable Care Act, not even those portions of the Act that impose a mandate requiring abortion and birth control coverage. They ask only that they be exempted from that mandate. To deny them this exemption is to relegate them to second-class status and to communicate the message that their religious views and practices are unacceptable and out of place in American life and society.

As this Court recognized in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), accommodation of religious

needs (in that case, released time for religious instruction) is constitutionally appropriate:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. to hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

One appropriate way to accommodate people's religious needs is to exempt those with sincere religious convictions from certain general requirements, as this Court recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (in that case, dealing with Amish objections to compulsory school attendance requirements). As the Court stated at 220, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Exemptions to certain legal requirements are sometimes the best and maybe the only way religious and nonreligious majorities and minorities can co-exist harmoniously in a common society.

And that is all the Little Sisters are asking -- exemption from a requirement that violates their sincere and deeply-held religious beliefs.

Amicus urges this Court to reverse the decision of the Tenth Circuit and issue a clear ruling that protects the Little Sisters' constitutional right to free exercise of religion and establishes that nonprofit organizations have at least as much protection under the Free Exercise Clause as do for-profit corporations.

Respectfully submitted, this the 11th day of January, 2016.

/s John A. Eidsmoe
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